SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 15

CHARLES L. McNALLY, PETITIONER,

vs.

HENRY C. HILL, WARDEN UNITED STATES NORTHEASTERN PENITENTIARY, LEWISBURG, PA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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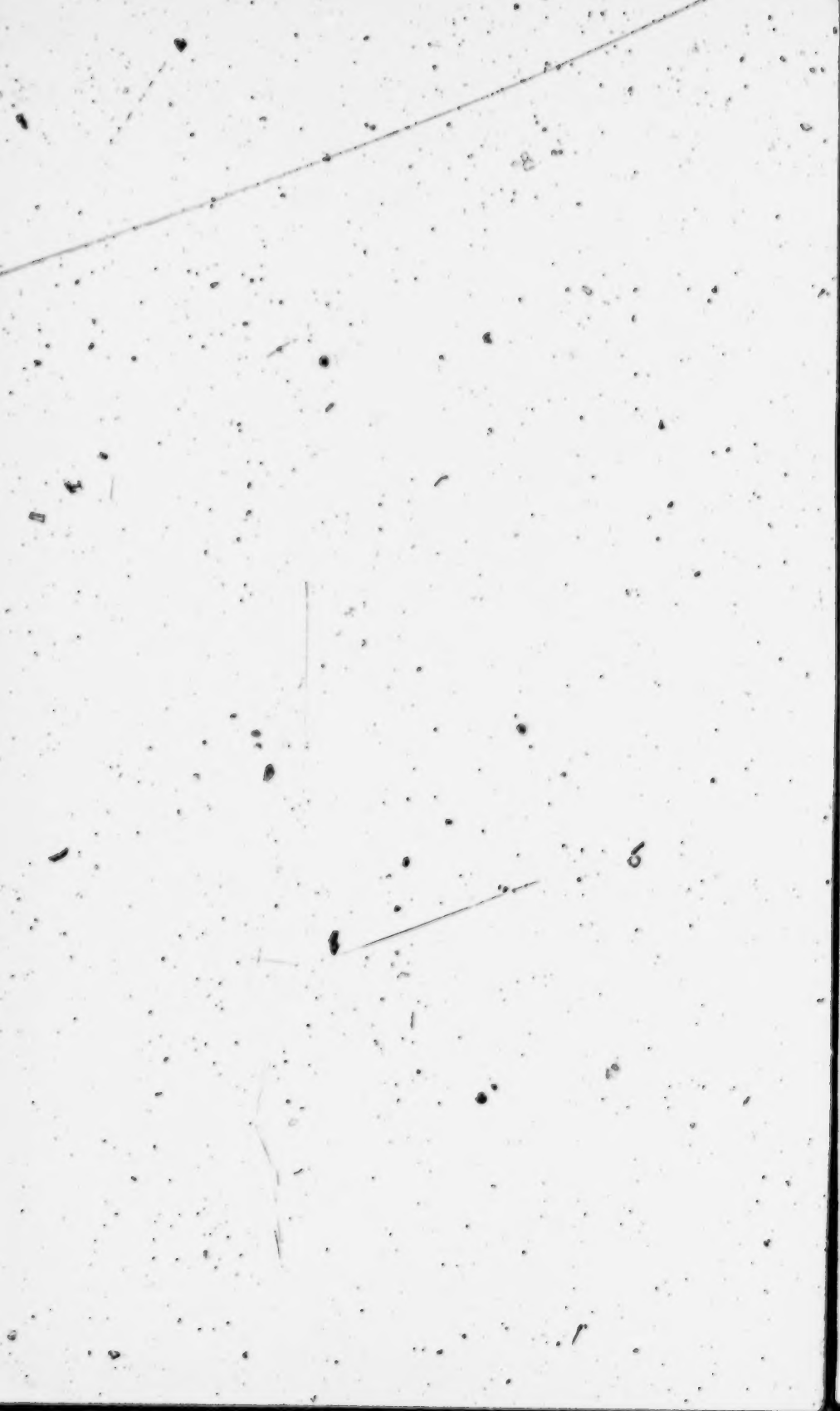

IN THE

District Court of the United States,

MIDDLE DISTRICT OF PENNSYLVANIA.

No. 8. HABEAS CORPUS.

THE UNITED STATES *v.* CHARLES L. McNALLY *v.* HENRY C. HILL, Warden, U. S. Penitentiary, Lewisburg, Pennsylvania.	Attorneys: For United States: For Defense: Nathan Fink, Esq., Scranton, Pa.

DOCKET ENTRIES.

Apr. 6, 1933.	Petition for writ of Habeas Corpus and Order to show cause returnable April 18, 1933, at Scranton, Pennsylvania.
Apr. 12, 1933.	Marshal's return of service of certified copy of petition and rule executed.
May 16, 1933.	Order dismissing petition and discharging rule.
Aug. 11, 1933.	Assignment of errors.
Aug. 25, 1933.	Notice of Appeal to the United States Circuit Court of Appeals for the Third Circuit and Petition for allowance of Appeal, and Order allowing the appeal. (J)
Aug. 25, 1933.	Citation issued to Henry C. Hill, Esq. and handed Mr. Fink.

Aug. 25, 1933. Bond covering Costs on Appeal, AMERICAN SURETY COMPANY OF NEW YORK, Amount of Bond $250.00.

Aug. 25, 1933. Præcipe for record on appeal for preparation of transcript of record.

Aug. 25, 1933. Citation returned "Now Aug. 25, 1933, service admitted and copy received of the within citation, H. L. Hill".

Aug. 25, 1933. Complete files sent to S. W. Hofford, Clerk of Court at Scranton, Pa.

Aug. 28, 1933. Affidavit of service of notice of appeal. Order directing all original files to be mailed Clerk, U. S. Circuit Court of Appeals. All original files mailed Wm. P. Rowland, Clerk, U. S. Circuit Court of Appeals.

PETITION FOR WRIT OF HABEAS CORPUS.

IN THE DISTRICT COURT OF THE UNITED STATES,
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

No. 8. HABEAS CORPUS.

Charles L. McNally

v.

Henry C. Hill, Warden, United States Penitentiary, Lewisburg, Pennsylvania.

To the Honorable the Judges of the said Court:

Your petitioner, CHARLES L. MCNALLY, by his attorney, Nathan Fink, Esq., respectfully represents:

1. That at the June term of the District Court of the United States within and for the Eastern District of New York, in the year 1931, the following true bills of indictment were brought against your petitioner and others by a Grand Jury of the United States of America:

A. Indictment No. 28944, containing three counts, charging your petitioner and other defendants therein named with violation of an Act of Congress, Title 18, U. S. C. A. Sections 88 and 408, as follows:

(a) Count One of said indictment charging your petitioner and other defendants therein named with having conspired to unlawfully, knowingly, feloniously, and wilfully, transport or cause to be transported in

interstate commerce, motor vehicles stolen from the true owners at the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York; and that the petitioner and other defendants therein named conspired to sell the said motor vehicles, so transported, in interstate commerce, etc.; said count containing also overt acts in pursuance of such conspiracy.

(b) Count Two of said indictment charging that your petitioner and other defendants therein named did unlawfully, knowingly, feloniously, and wilfully transport in interstate commerce motor vehicles stolen from the true owners at the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York.

(c) Count Three of said indictment charging that your petitioner and other defendants therein named, on or about the twelfth day of February, 1930, at Jersey City, in the State of New Jersey, did unlawfully, knowingly, feloniously, and wilfully sell a certain motor vehicle, which said motor vehicle had theretofore been transported in interstate commerce from the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York, to Jersey City in the State of New Jersey, the said defendants knowing that the said car so sold had been stolen and transported in interstate commerce. Said indictment and said three counts in said indictment being more fully set forth in copies of same attached hereto and marked Petitioner's Exhibit "A."

B. Indictment No. 28945, containing one count, charging your petitioner and other defendants therein named with having conspired unlawfully, knowingly, feloniously, and wilfully, to transport, and cause to be transported and to sell in interstate commerce a certain

motor vehicle described in said indictment, which had been stolen from the true owner at the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York. Said indictment containing also overt acts committed in pursuance of such conspiracy. Said indictment is more fully set forth in copies of same attached hereto and marked Petitioner's Exhibit "B."

2. That on November 25, 1931, at the trial of your petitioner and other defendants upon aforesaid indictment No. 28944, a verdict of guilty was rendered by a jury against your petitioner and said other defendants, your petitioner having been found guilty of all three counts in said indictment. That on September 28, 1931, at the trial of your petitioner and other defendants upon aforesaid Indictment No. 28945, a verdict of guilty was rendered by a jury against your petitioner and the said other defendants.

3. That in pursuance of the aforesaid verdicts of guilty, your petitioner was sentenced by the judges of the said District Court of the United States for the Eastern District of New York, as follows:

A. Upon Count One of Indictment No. 28944, two years' imprisonment at a penitentiary or prison camp without costs; upon Count Two of said indictment, four years' imprisonment at a penitentiary or prison camp without costs; upon Count Three of said indictment, four years' imprisonment at a penitentiary or prison camp without costs. Sentence on Count One to run concurrently with sentence on Counts Two and Three; sentence on Counts Two and Three to run consecutively. Said sentences to date from the thirtieth day of November, 1931.

B. Upon Indictment No. 28945, two years' imprisonment in a penitentiary or prison camp, without costs. Sentence to date from the tenth day of December, 1931.

4. That in pursuance of the aforesaid sentences your petitioner was committed to the United States Penitentiary at Leavenworth, Kansas, to serve and perform said services. That subsequently your petitioner was transferred to the United States Penitentiary at Lewisburg, Pennsylvania; which said penitentiary is within the jurisdiction of your Honorable Court. Copies of the writs of commitment and marshal's returns are hereto attached and marked Exhibits "C" and "D".

5. That your petitioner is at the date of this petition serving and performing the aforesaid sentences in the said United States Penitentiary at Lewisburg, Pennsylvania.

6. That Count Three of Indictment No. 28944 charges, as aforesaid, that your petitioner and other defendants therein named unlawfully and knowingly sold a stolen motor vehicle in Jersey City, in the State of New Jersey, after said vehicle had been transported in interstate commerce; that said Count Three of said indictment therefore charges your petitioner with an offense which it alleges was committed in Jersey City, in the State of New Jersey, which city and State are outside of the jurisdiction limits of the said United States District Court for the Eastern District of New York.

7. That the said District Court of the United States for the Eastern District of New York was without power, authority and jurisdiction to impose the judgment and sentence of four years' imprisonment

for the offense charged in the said third count of said indictment, for the reason that the offense charged was alleged to have been committed outside of the jurisdictional limits of said district court. That the said district court exceeded its power, authority and jurisdiction in imposing sentence upon your petitioner upon the verdict rendered by the jury on the trial of said petitioner upon the offense charged by the said third count of said indictment; that the verdict, judgment, and commitment founded upon said third count of said indictment are invalid.

8. That the verdict, judgment, and commitment under which your petitioner is now serving said four years' sentence imposed upon said Count Three of said indictment, are null and void, as your petitioner under both Article 3, Section 2, Clause 3, of the Constitution of the United States, and the Sixth Amendment thereto, could be tried for the offense described and alleged in said third count of said indictment only in the State and district wherein the crime charged therein was alleged to have been committed, to wit, the District Court of the United States for the District of New Jersey.

9. That the sentences which your petitioner is serving at the aforesaid penitentiary are valid only to the extent imposed upon the petitioner on Counts One and Two of Indictment No. 28944, to wit, two years' imprisonment and four years' imprisonment, respectively, said terms running concurrently and commencing as of November 30, 1931; and on Indictment No. 28945, to wit, two years' imprisonment, commencing as of December 10, 1931. That the maximum imprisonment validly imposed upon your petitioner is therefore not more than four years' imprisonment.

10. That by Act of Congress, Title 18, U. S. C. A. No. 714, it is provided that a prisoner serving a sentence of imprisonment in a United States penitentiary is entitled, upon good behavior during the period of service and performance of such sentence, to parole upon application therefor when one-third of such prisoner's sentence is served and performed.

11. That on the thirtieth day of March, 1933, your petitioner had served and performed one-third of the said valid sentences of four years.

12. That under the regulations of the Parole Board of the said United States Penitentiary at Lewisburg, Pennsylvania, your petitioner is entitled, under the facts herein recited, to make application for parole and to have such application heard and decided by the aforesaid Board at its quarterly meeting in May, 1933.

13. That your petitioner is, because of the void and invalid sentence above described, being deprived of his right under the law to make application before the Parole Board of said Penitentiary and to be heard by the said Board at the time mentioned in paragraph 12, above.

14. That your petitioner's behavior during the period of service of the aforesaid sentences was good and that he violated no rules of the said penitentiary and suffered no demerits which might cause the period of imprisonment to be extended beyond the time provided by the said Act of Congress, mentioned in paragraph 9, above.

WHEREFORE, your petitioner prays this Court to order the issuance of a writ of Habeas Corpus in this cause directed to Henry C. Hill, Warden of the said

United States Penitentiary at Lewisburg, Pennsylvania, ordering and directing him to have the body of the petitioner before this Honorable Court at a date to be fixed by the said Court, at which time he further prays the Court that he shall be granted a discharge from the service of the said invalid and void sentence of four years imprisonment; and for such other and further relief as to the Court may seem proper.

And he will ever pray.

NATHAN FINK,
Attorney for Petitioner.

April 6, 1933.

STATE OF PENNSYLVANIA, }
COUNTY OF LACKAWANNA, } *ss.:*

NATHAN FINK, being duly sworn, deposes and says that he is attorney for the petitioner named in the foregoing petition, that he has authority to make this affidavit for and on behalf of said petitioner and does so, that he has read the contents thereof, and that the statements made therein are true to the best of his information and belief.

NATHAN FINK.

Sworn to before me this sixth day of April, 1933.

CATHERN G. BREEN.
(Seal) *Notary Public.*
My commission expires March 9, 1935.

ORDER TO SHOW CAUSE.

(Filed April 6, 1933.)

Now, this sixth day of April, 1933, upon presentation of the foregoing verified petition for the issuance of a writ of habeas corpus directed to Henry C. Hill, Warden of the United States Penitentiary at Lewisburg, Pennsylvania, to have the body of the petitioner before this Court at a date to be set by the Court, and to discharge the said petitioner from the service of a sentence of four years imprisonment, alleged by the petitioner to be invalid and void, and upon due consideration of said petition, rule is granted to show cause why a writ of habeas corpus should not issue, as prayed for in said petition, returnable to next argument court at Scranton, Pennsylvania, on Tuesday, April 18, 1933.

ALBERT W. JOHNSON,
U. S. District Judge.

PETITIONER'S EXHIBIT "A."

EASTERN DISTRICT OF NEW YORK, *ss.:*

I, Percy G. B. Gilkes, Clerk of the District Court of the United States for the Eastern District of New York, do hereby certify that the ~~foregoing~~ annexed is a true copy of an original Indictment with Endorsements on file and remaining of record in my office.

IN TESTIMONY WHEREOF, I have caused the Seal of said Court to be hereunto affixed, at the Borough of Brooklyn, in the Eastern District of New York, this 15th day of December, in the year of our Lord one thousand nine hundred and ~~twenty~~ thirty two and of the Independence of the United States the one hundred and ~~forty~~ fifty-seventh.

Percy G. B. Gilkes, *Clerk*,
By S R Feuer, *Deputy Clerk*.

DISTRICT COURT OF THE UNITED STATES OF AMERICA
EASTERN DISTRICT OF NEW YORK

At a Stated Term of the District Court of the United States of America, for the Eastern District of New York, begun and held in the Borough of Brooklyn, City of New York, within and for the District aforesaid, on the third day of June in the year of our Lord one thousand nine hundred and thirty-one, and continued by adjournment to and including the thirtieth day of June in the year of our Lord one thousand nine hundred and thirty-one.

EASTERN DISTRICT OF NEW YORK, *ss:*

The Grand Jurors of the United States of America, within and for the district aforesaid, on their oaths present that

JACK BERMAN,
alias Leo Berman,
alias Leo David,
alias Jack Davis
alias Jack Martin,
alias Jack Larson,
alias Jack Lusser,
alias Jack Loesser,
CHARLES L. MCNALLY,
alias Charles McDermott,
alias "Mack",
D. E. HAWKINS,
alias Buddy Hawkins,
alias "Two Gun" Hawkins,
alias D. Van Horn,
alias Thomas E. O'Brien,
alias Harry A. Schwartz,
FRANK MURRAY,
alias "Buck" Murray,
WILSON W. BADEN,
FRED BECHER,
alias Fred Beacher,
MURRAY LITTMAN,
ARTHUR KOCH,
alias Otto Koch,
DAN LEAHY,
alias Laby,
HENRY "DOE" (last name being fictitious),

and

JOHN DOE,

hereinafter called the defendants, on or about and between the 1st day of September, 1929, up to and including the date of the filing of this indictment, at the Borough of Brooklyn, County of Kings, City, State and Eastern District of New York, and within the jurisdiction of this Court, at the Borough of Manhattan, City, State and Southern District of New York, and in the States of New Jersey, Pennsylvania, Massachusetts, Alabama, and Tennessee, and in divers other places to the Grand Jurors unknown, did unlawfully, wilfully, knowingly, and feloniously conspire, combine, confederate, and agree among themselves, and with Lynn Kennemer and William S. Hayes alias Wilson, and divers other persons to the Grand Jurors unknown, to unlawfully, wilfully, and knowingly violate Title 18, United States Code, Section 408, in the following manner, that is to say: that at the times aforesaid, and at the places aforesaid, the aforementioned defendants, JACK BERMAN, alias Leo Berman, alias Leo David, alias Jack Davis, alias Jack Martin, alias Jack Larson, alias Jack Lusser, alias Jack Loesser, CHARLES L. McNALLY, alias Charles McDermott, alias "Mack", D. E. HAWKINS, alias Buddy Hawkins, alias "Two Gun" Hawkins, alias D. Van Horn, alias Thomas E. O'Brien, alias Harry A. Schwartz, FRANK MURRAY, alias Buck Murray, WILSON W. BADEN, FRED BEECHER, alias Fred Beacher, MURRAY LITTMAN, ARTHUR KOCH, alias Otto Koch, DAN LEAHY, alias Laby, HENRY "DOZ" (last name being fictitious), and JOHN DOE, did unlawfully, wilfully and knowingly, combine, conspire, confederate and agree among themselves, and with Lynn Kennemer and William S. Hayes alias Wilson, and divers other persons to the Grand Jurors unknown, to unlawfully, knowingly, feloniously and wilfully transport, and cause to be transported in interstate commerce, to wit: from the Borough of Brooklyn, County of Kings, City, State and Eastern District of New

York, to the States of New Jersey, Pennsylvania, Massachusetts, Alabama and Tennessee, and in divers other places to the Grand Jurors unknown, upwards of twenty (20) motor vehicles, a more particular description of which is to the Grand Jurors unknown, which said motor vehicles had theretofore and during the times above set forth, been stolen from the true owners of said motor vehicles, at the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York, and the said defendants did further conspire, combine, confederate and agree to receive, conceal, barter and sell, the said motor vehicles, so transported, in interstate commerce, as aforesaid, knowing that the said motor vehicles had been so transported and caused to be transported in interstate commerce, and the said defendants knowing full well that the said motor vehicles had been stolen. And it was further a part of the said conspiracy, that the defendants should cause the motor numbers on the said motor vehicles above set forth, so stolen, transported, and caused to be transported, received, concealed, bartered and sold as above set forth, to be changed so that identification of the said motor vehicles could not be made by the true owners thereof. And it was further a part of the said conspiracy that the said motor vehicles so stolen, transported, and caused to be transported as aforesaid, and received, concealed, bartered, and sold as aforesaid, should be registered in the names of fictitious persons, for the purpose of enabling the said defendants to sell the said stolen motor vehicles, as if they were the actual and true owners thereof, and thus procure monetary considerations for the sale and barter of the said motor vehicles, the said defendants and each one of them knowing that the said motor vehicles were stolen from the true owners thereof; all in violation of law, and against the peace and dignity of the United States, and contrary to the form of the statute

in such case made and provided (Title 18, United States Code, Sections 88 and 408), and in pursuance of said conspiracy and for the purpose of effecting the object and purpose of the same, the said defendants did commit the following overt acts.

OVERT ACTS.

1.

That in pursuance of the said conspiracy, and for the purpose of effecting the object and purpose of the same, that on or about the 3rd day of February, 1930, at the Borough of Brooklyn, County of Kings, City, State and Eastern District of New York, the said defendants did transport and cause to be transported in interstate commerce, to wit: from the said Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York, to and into Jersey City, in the State of New Jersey, a certain motor vehicle, to wit: a Lincoln Sedan, 1929 model, original motor number 59638, original serial number 59638, which said motor vehicle so described as aforesaid, had theretofore been stolen on or about December 14, 1929, from the true owner thereof, at the Borough of Brooklyn, County of Kings, City, State and Eastern District of New York.

2.

That in pursuance of the said conspiracy, and for the purpose of effecting the object and purpose of the same, that on or about the 1st day of September, 1930, at the Borough of Brooklyn, County of Kings, City, State and Eastern District of New York, the said defendants did transport, and cause to be transported in interstate commerce, a certain motor vehicle, to wit: a Buick Coupe, 1930 model, original motor number 2585324, original serial number, 2401358, which said motor vehicle was transported from the Borough of

Brooklyn, County of Kings, City, State, and Eastern District of New York, to and into Jersey City, in the State of New Jersey, which said motor vehicle had theretofore, and on or about the 9th day of June, 1930, been stolen from the true owner thereof, at the Borough of Brooklyn, County of Kings, City, State and Eastern District of New York.

3.

That in pursuance of the said conspiracy, and for the purpose of effecting the object of the same, that on or about the 10th day of July, 1930, at the Borough of Brooklyn, County of Kings, City, State and Eastern District of New York, the said defendants did transport and cause to be transported in interstate commerce, to wit: from the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York, to and into New Haven, in the State of Connecticut, a certain motor vehicle, to wit: a La Salle Sedan, 1929 model, original motor number 605189, original serial number 605189, which said motor vehicle so described as aforesaid, had theretofore been stolen on or about the 30th day of June, 1930, from the true owner thereof, at the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York.

4.

That in pursuance of the said conspiracy, and for the purpose of effecting the object and purpose of the same, that on or about the 15th day of April, 1930, at the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York, the said defendants did transport and cause to be transported in interstate commerce, to wit: from the Borough of Brooklyn, County of Kings, City, State, and Eastern District of

New York, to and into Hoboken, in the State of New Jersey, a certain motor vehicle, to wit: a Buick Coupe, 1930 model, original motor number 2514064, original serial number 2388380, which said motor vehicle so described as aforesaid, had theretofore been stolen on or about the 14th day of November, 1929, from the true owner thereof, at the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York.

5.

That in pursuance of the said conspiracy, and for the purpose of effecting the object and purpose of the same, that on or about the 25th day of May, 1930, at the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York, the said defendants did receive and conceal, and cause to be received and concealed, in a certain garage, located in the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York, a certain motor vehicle, to wit: a Packard Sedan, 1930, model, original motor number 283861, original serial number 283468, which said motor vehicle had theretofore been stolen from the true owner thereof, on or about the 19th day of May, 1930, at the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York.

6.

That in pursuance of the said conspiracy, and for the purpose of effecting the object of the same, that on or about the 31st day of May, 1930, at the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York, the said defendants did receive and conceal, and cause to be received and concealed in a certain garage, located in the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York, a certain motor vehicle, to wit: a Packard

Sedan, 1930 model, original motor number 278366, original serial number 278359, which said motor vehicle had theretofore been stolen from the true owner thereof, on or about the 30th day of May, 1930, at the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York.

7.

That in pursuance of the said conspiracy, and for the purpose of effecting the object and purpose of the same, that on or about the 7th day of June, 1930, at the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York, the said defendants did receive and conceal, and cause to be received and concealed in a certain garage, located in the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York, a certain motor vehicle, to wit: a Packard Sedan, 1930 model, original motor number 184711, original serial number 184633, which said motor vehicle had theretofore been stolen from the true owner thereof, on or about the 2nd day of June, 1930, at the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York.

8.

That in pursuance of the said conspiracy, and for the purpose of effecting the object and purpose of the same, that on or about the 25th day of May, 1930, at the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York, the said defendants did transport, and cause to be transported in interstate commerce, a certain motor vehicle, to wit: a Packard Sedan, 1930 model, original motor number 283861, original serial number 283468, which said motor vehicle was transported from the Borough of Brooklyn, County of Kings, City, State, and Eastern

District of New York, to and into the City of Athens, in the State of Alabama, which said motor vehicle had theretofore, and on or about the 19th day of May, 1930, been stolen from the true owner thereof, at the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York.

9.

That in pursuance of the said conspiracy, and for the purpose of effecting the object and purpose of the same, that on or about the 17th day of July, 1930, at the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York, the said defendants did transport, and cause to be transported in interstate commerce, a certain motor vehicle, to wit: a Packard Sedan, 1930 model, original motor number 293914, original serial number 295993, which said motor vehicle was transported from the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York, to and into the town of Doylestown, State of Pennsylvania, which said motor vehicle had theretofore, and on or about the 7th day of July, 1930, been stolen from the true owner thereof, at the Borough of Brooklyn, County of Kings, City, State and Eastern District of New York.

10.

That in pursuance of the said conspiracy, and for the purpose of effecting the object and purpose of the same, that on or about the 17th day of July, 1930, the said defendants, at the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York, did barter and sell a certain motor vehicle, to wit: a Packard Sedan, 1930 model, original motor number 293914, original serial number 295993, which said motor vehicle had been transported in interstate commerce by the said defendants, and which said motor

vehicle had been stolen from the true owner thereof, on or about the 7th day of July, 1930.

SECOND COUNT

AND THE GRAND JURORS AFORESAID ON THEIR OATHS AFORESAID DO FURTHER PRESENT THAT

JACK BERMAN,
alias Leo Berman,
alias Leo David,
alias Jack Davis,
alias Jack Martin,
alias Jack Larson,
alias Jack Lusser,
alias Jack Loesser,
CHARLES L. McNALLY,
alias Charles McDermott,
alias "Mack",
D. E. HAWKINS,
alias Buddy Hawkins,
alias "Two Gun" Hawkins,
alias D. Van Horn,
alias Thomas E. O'Brien,
alias Harry A. Schwartz,
FRANK MURRAY,
alias Buck Murray,
WILSON W. BADEN,
FRED BEECHER,
alias Fred Beacher,
MURRAY LITTMAN,
ARTHUR KOCH,
alias Otto Koch,
DAN LEAHY,
alias Laby,
HENRY "DOE" (last name being fictitious),

and

JOHN DOE,

hereinafter called the defendants, on or about the 9th day of October, 1929, at the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York, and within the jurisdiction of this Court did unlawfully, knowingly, and wilfully transport, and cause to be transported in interstate commerce, to wit: from the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York, to the City of Hohokus, in the State of New Jersey, a certain motor vehicle, to wit: a Cadillac Town Sedan, 1929 model, original motor number 334712, original serial number 334712, which said motor vehicle had theretofore been stolen on or about the 30th day of September, 1929 from the true owner thereof, at the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York, and which said motor vehicle so described as aforesaid, was unlawfully, knowingly, illegally, and wilfully, transported, and caused to be transported in interstate commerce, by the said defendants, said defendants then and there well knowing the said motor vehicle to have been stolen; against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided (Title 18, United States Code, Section 408).

THIRD COUNT

AND THE GRAND JURORS AFORESAID ON THEIR OATHS AFORESAID DO FURTHER PRESENT THAT

JACK BERMAN,
alias Leo Berman,
alias Leo David,
alias Jack Davis,
alias Jack Martin,
alias Jack Larson,
alias Jack Lusser,
alias Jack Loesser,

CHARLES L. McNALLY,
alias Charles McDermott,
alias "Mack",
D. E. HAWKINS,
alias Buddy Hawkins,
alias "Two Gun" Hawkins,
alias D. Van Horn,
alias Thomas E. O'Brien,
alias Harry A. Schwartz,
FRANK MURRAY,
alias Buck Murray,
WILSON W. BADEN,
FRED BEECHER,
alias Fred Beacher,
MURRAY LITTMAN,
ARTHUR KOCH,
alias Otto Koch,
DAN LEAHY,
alias Laby,
HENRY "DOE" (last name being fictitious)

and

JOHN DOE,

hereinafter called the defendants, on or about the 12th day of February, 1930, at Jersey City, in the State of New Jersey, did unlawfully, knowingly, and wilfully, sell a certain motor vehicle, to wit: a Lincoln Sedan, 1929 model, original motor number 59638, original serial number 59638, which said motor vehicle had theretofore been transported in interstate commerce, from the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York, to Jersey City, in the State of New Jersey, and which said motor vehicle had theretofore been stolen from the true owner thereof, on or about the 14th day of December, 1929, at the Borough of Brooklyn, County of Kings, City,

State, and Eastern District of New York, the said defendants knowing that the said car so sold as aforesaid, had been stolen and transported in interstate commerce; against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided (Title 18, United States Code, Section 408).

HOWARD W. AMELI
United States Attorney for the
Eastern District of New York.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA vs. CHARLES L. McNALLY, et'al	Cr. #28944 Vio: Title 18, U. S. C. Secs. 88 and 408.

June 30, 1931—Indictment filed.

Nov. 25, 1931—Campbell J, Case called defts. on trial present. Jury return and render a verdict of guilty as to deft. McNally on 1st, 2nd & 3rd counts.

Nov. 30, 1931—Campbell J, Defts. Berman, McNally, Littman & Fioto present.
Deft. McNally sentenced to be imprisoned for 2 years on count one, 4 years on count two and 4 years on count three at a Penitentiary or Prison Camp without costs, sentence on count one to run concurrently with sentence on counts two and three, sentence on counts two and three to run consecutively.

EASTERN DISTRICT OF NEW YORK, *ss.:*

I, Percy G. B. Gilkes, Clerk of the District Court of the United States for the Eastern District of New York, do hereby certify that the foregoing is a true ~~copy of an original~~ extract from the Docket Entries ~~on file and~~ remaining of record in my office.

IN TESTIMONY WHEREOF, I have caused the Seal of said Court to be hereunto affixed, at the

Borough of Brooklyn, in the Eastern District of New York, this 15th day of December, in the year of our Lord one thousand nine hundred and ~~twenty~~ thirty-two and of the Independence of the United States the one hundred and ~~forty~~ fifty-seventh.

Percy G. B. Gilkes, *Clerk.*
By S. R. Feuer, *Deputy Clerk.*

Cr. 28944.

District Court of the United States
Eastern District of New York

THE UNITED STATES OF AMERICA

vs.

JACK BERMAN, CHARLES L. MCNALLY, D. E. HAWKINS, FRANCIS B. MURRAY, WILSON W. BADEN, FRED BEECHER, MURRAY LITTMAN, ARTHUR KOCH, DAN LEAHY, HENRY "DOE" (last name being fictitious and their aliases) and JOHN DOE, Defendants.

INDICTMENT

Title 18, United States Code.
Sections 88 and 408.

HOWARD W. AMELI,
United States Attorney, Federal Building, Borough of Brooklyn, New York City, N. Y.

A TRUE BILL.

THOMAS F. SHANNON
Foreman

Filed June 30, 1931.

PETITIONER'S EXHIBIT "B."

EASTERN DISTRICT OF NEW YORK, *ss.:*

I, Percy G. B. Gilkes, Clerk of the District Court of the United States for the Eastern District of New York, do hereby certify that the foregoing is a true copy of an original Indictment with Endorsements on file and remaining of record in my office.

In Testimony Whereof, I have caused the Seal of said Court to be hereunto affixed, at the Borough of Brooklyn, in the Eastern District of New York, this 13th day of December in the year of our Lord one thousand nine hundred and ~~twenty~~ thirty two and of the Independence of the United States the one hundred and ~~forty~~ fifty-seventh.

Percy G. B. Gilkes, *Clerk.*
By S. R. Feuer, *Deputy Clerk.*

DISTRICT COURT OF THE UNITED STATES OF AMERICA

EASTERN DISTRICT OF NEW YORK

At a Stated Term of the District Court of the United States of America, for the Eastern District of New York, begun and held in the Borough of Brooklyn, City of New York, within and for the District aforesaid, on the third day of June, in the year of our Lord one thousand nine hundred and thirty-one, and continued by adjournment to and including the thirtieth day of June in the year of our Lord one thousand nine hundred and thirty-one.

EASTERN DISTRICT OF NEW YORK, *ss.*:

The Grand Jurors of the United States of America, within and for the district aforesaid, on their oaths present that

JACK BERMAN,
alias Leo Berman,
alias Leo David,
alias Jack Davis,
alias Jack Martin,
alias Jack Larson,
alias Jack Lusser,
alias Jack Loesser,
CHARLES L. MCNALLY,
alias Charles McDermott,
alias "Mack",
HARRY F. BABST,
and
SAMUEL LEIGHTON FROOKS,

hereinafter called the defendants, on or about and between the 24th day of July, 1930, up to and including the 15th day of February, 1931, at the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York, and within the jurisdiction of this Court, at the Borough of Manhattan, City, State, and Southern District of New York, and in the City of Dallas, in the State of Texas, and in the State of New Jersey, and in divers other places to the Grand Jurors unknown, did unlawfully, wilfully, knowingly, and feloniously, conspire, combine, confederate, and agree among themselves, and with William S. Hayes, alias Wilson, and Cecil Downs, and divers other persons to the Grand Jurors unknown, to unlawfully, wilfully, and knowingly violate Title 18, United States Code, Section 408, in the following manner, that is to say: that at the times aforesaid, and at the places

aforesaid, the aforementioned defendants, JACK BERMAN, alias Leo Berman, alias Leo David, alias Jack Davis, alias Jack Martin, alias Jack Larson, alias Jack Lusser, alias Jack Loesser, CHARLES L. MCNALLY, alias Charles McDermott, alias "Mack", HARRY F. BABST, and SAMUEL LEIGHTON FROOKS, did unlawfully, wilfully, and knowingly, combine, conspire, confederate, and agree, among themselves, and with William S. Hayes, alias Wilson, and Cecil Downs, and divers other persons to the Grand Jurors unknown, to unlawfully, knowingly, feloniously, and wilfully, transport, and cause to be transported in interstate commerce, to wit: from the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York, to the State of Texas, and to the State of New Jersey, a certain motor vehicle, to wit: a Buick Sedan, 1930 model, original motor number 2609887, original serial number 2431898, and which said motor vehicle had theretofore, and during the times aforesaid, to wit: on or about the 24th day of July, 1930, been stolen from William Soshnick, the true owner of said motor vehicle, at the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York. And it was further a part of the said conspiracy, that the said defendants should receive, conceal, barter, and sell, the said motor vehicle so illegally transported in interstate commerce, as aforesaid, all of the said defendants knowingly full well that the said motor vehicle so described as aforesaid, so transported, received, concealed, bartered, and sold, as aforesaid, had been stolen, as aforesaid. And it was further a part of the said conspiracy that the defendants should cause the motor number on the said motor vehicle to be changed, so that identification of the said motor vehicle could not be made by the true owner thereof. And it was further a part of the said conspiracy that the said motor vehicle should be registered in the name of a fictitious person, for the pur-

pose of enabling the said defendants to barter, sell, and dispose of, and to receive, and conceal the said motor vehicle, as if the defendants were the true and actual owners thereof, all of the said defendants knowing that the said motor vehicle had been stolen from the true owner thereof; all in violation of law, and against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided (Title 18, United States Code, Sections 88 and 408), and in pursuance of said unlawful conspiracy, and for the purpose of effecting the object and purpose of the same, the said defendants did commit the following overt acts:

OVERT ACTS.

1.

That in pursuance of the said conspiracy, and for the purpose of effecting the object and purpose of the same, that on or about the 23rd day of October, 1930, the said defendants did unlawfully, illegally, and feloniously, transport a certain motor vehicle, to wit: a Buick Sedan, 1930 model, original motor number 2609887, original serial number 2431898, from the Borough of Manhattan, City, State, and Southern District of New York, to the City of Long Branch, in the State of New Jersey, the said motor vehicle having been theretofore, and on the 24th day of July, 1930, stolen from the true owner thereof, at the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York.

2.

That in pursuance of the said conspiracy, and for the purpose of effecting the object and purpose of the same, that on or about the 9th day of August, 1930, at the Borough of Brooklyn, County of Kings,

City, State, and Eastern District of New York, the said defendants did transport, and cause to be transported in interstate commerce, a certain motor vehicle, to wit: a Buick Sedan, 1930 model, original motor number 2609887, original serial number 2431898, which said motor vehicle was transported, and cause to be transported, from the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York, to and into the City of Dallas, in the State of Texas, which said motor vehicle, had theretofore, and on or about the 24th day of July, 1930, been stolen from the true owner thereof, at the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York.

3.

That in pursuance of the said conspiracy, and for the purpose of effecting the object and purpose of the same, that on or about the 23rd day of October, 1930, at the Borough of Manhattan, City, State, and Southern District of New York, the said defendants did, with the intent and purpose to conceal the transfer and transportation of a certain motor vehicle, to wit: a Buick Sedan, 1930 model, original motor number 2609887, original serial number 2431898, make, and cause to be made, a false and fictitious bill of sale, purporting to transfer title of the said motor vehicle from one, Cecil Downs, to an unnamed person.

4.

That in pursuance of the said conspiracy, and for the purpose of effecting the object and purpose of the same, that on or about the 16th day of January, 1931, at the Borough of Manhattan, City, State, and Southern District of New York, the said defendants did receive and conceal a certain motor vehicle, to wit: a

Buick Sedan, 1930 model, original motor number 2609887, original serial number 2431898, which said motor vehicle had theretofore been transported in interstate commerce, from the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York, to the City of Dallas, in the State of Texas, and from the City of Dallas, in the State of Texas, to the Borough of Manhattan, City, State, and Southern District of New York, and from the Borough of Manhattan, City, State, and Southern District of New York, to the City of Long Branch, in the State of New Jersey, and from the City of Long Branch in the State of New Jersey, to the Borough of Manhattan, City, State, and Southern District of New York, the said motor vehicle having been, on or about the 24th day of July, 1930, stolen from the true owner thereof, at the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York.

HOWARD W. AMELI,
United States Attorney for the Eastern District of New York.

Cr. #28945

DISTRICT COURT OF THE UNITED STATES
EASTERN DISTRICT OF NEW YORK

The United States of America

vs.

Jack Berman, alias Leo Berman, alias Leo David, alias Jack Davis, alias Jack Martin, alias Jack Larson, alias Jack Lusser, alias Jack Loesser.
Charles L. McNally, alias Charles McDermott, alias "Mack",
Harry F. Babst and Samuel Leighton Frooks,
Defendants.

INDICTMENT

Title 18, United States Code, Sections 88 and 408.

HOWARD W. AMELI,
United States Attorney, Federal Building, Borough of Brooklyn, New York City, N. Y.

A TRUE BILL.

THOMAS F. SHANNON
Foreman.

Filed June 30, 1931.

July-13-1931—INCH J.—Defendants Berman, McNally & Frooks arraigned each plea not guilty bail fixed at $3000 each as to Berman & McNally and $500—as to Frooks Defendants ordered to return Aug-5-1931—Case marked peremptorily against the Government.

July-15-1931—Before INCH J.—Defendant Babst arraigned plea not guilty bail fixed at $2000—ordered to return Aug-5-1931.

Aug-5-1931—SHEPPARD J.—Defendants present—ordered to return September-2-1931 case marked peremptory against the government.

Sept- 2-1931—SHEPPARD J.—Defendants present ordered to return Sept-8-1931.

" - 8- " —SHEPPARD J.—Case called and referred to Judge Byers.

" - 8- " —Before BYERS J.—Defendants present ordered to return September-15th-1931.

" -15- " —Before BYERS J.—Defendants present trial ordered and adjourned to Sept-16-1931.

" -16- " —Before BYERS J.—Defendants present trial continued and adjourned to Sept-17-1931.

" -17- " —Before BYERS J.—Defendants present trial continued and adjourned to Sept-18-1931.

" -18- " —Before BYERS J.—Defendants present trial continued and adjourned to Sept-22-1931.

" -22- " —Before BYERS J.—Defendants present trial continued and adjourned to Sept-23-1931.

" -23- " —Before BYERS J.—Defendants present trial continued and adjourned to Sept-24-1931 at 11 A. M.

Sept.-24-1931—Byers, J.—Case called—Defendants present. Trial resumed and adjourned to Sept-25-1931.

" -25- " —Byers J.—Trial resumed, defendants present, Jury render a verdict of guilty as to defendants Berman & McNally and not guilty as to defendants Babst and Frooks. Jury polled on motion for defendants. Berman and McNally remanded to September-28-1931- for sentence. Defendants Babst and Frooks discharged.

" -28- " —Before Byers J.—Defendants Berman and McNally present. Motion to set aside verdict and in arrest of judgement denied. Defendant Berman sentenced to be imprisoned for 23 months at a Penitentiary or Prison Camp, without costs and sentence to date from July 13-1931- Defendant McNally sentenced to be imprisoned for 2 years at a Penitentiary or Prison Camp, without costs. Writ of Commitment for Berman issued.

Dec-10-1931—Before Moscowitz J.—Defendant McNally present remanded to custody of Marshall for execution of sentence.

PETITIONER'S EXHIBIT "C."

EASTERN DISTRICT OF NEW YORK, ss:

I, Percy S. B. Gilkes, Clerk of the District Court of the United States for the Eastern District of New York, do hereby certify that the ~~foregoing~~ annexed is a true copy of an original writ of Commitment with marshals Return on file and remaining of record in my office.

IN TESTIMONY WHEREOF, I have caused the Seal of said Court to be hereunto affixed, at the Borough of Brooklyn, in the Eastern District of New York, this 13th day of December, in the year of our Lord one thousand nine hundred and ~~twenty~~ thirty two and of the Independence of the United States the one hundred and ~~forty~~ fifty-seventh.

PERCY G. B. GILKES, *Clerk.*
By S. R. FEUER, *Deputy Clerk.*

WARRANT OF COMMITMENT

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Marshal of the United States for the Eastern District of New York, and to his Deputies or any or either of them, and the Attorney General or his authorized Representatives

GREETING:

WHEREAS, CHARLES L. MCNALLY now stands convicted before the District Court of the United States for the Eastern District of New York of having within

the said District on or about and between the 1st day of September, 1929, up to and including the date of the filing June 30, 1931, of this indictment, at the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York, and other places, violated Title 18, United States Code, Sections 88 and 408. (Conspiracy to transport stolen motor vehicle and cause to be transported.) contrary to the Statutes of the United States in such case made and provided;

AND WHEREAS, the said CHARLES L. McNALLY was, on the 30th day of November, 1931, at the Borough of Brooklyn, City of New York, and State of New York, by virtue of said conviction, sentenced by the said Court to be imprisoned for the term of Two (2) years on count one, Four (4) years on count two, Four (4) years on count three. Without costs, sentence on count one to run concurrently with sentence on count two and three. Sentence on counts two and three to run consecutively. the said sentence to be executed in Penitentiary or Prison Camp and to date from the 30th day of November, 1931.

WITNESS, the Honorable MARCUS B. CAMPBELL, Judge of the District Court of the United States for the Eastern District of New York, and the seal of said Court, at the Borough of Brooklyn, City of New York, in the Eastern District of New York, this 30th day of November in the year of our Lord one thousand nine hundred and thirty-one

PERCY G. B. GILKES
Clerk.
By JOHN R. SCOTT, Jr.
Deputy Clerk.

Crim. #28944

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

The United States

v.

Charles L. McNally

WRIT OF COMMITMENT

I hereby depute
to execute the within Writ

Dated , 192

.....
U. S. Marshal,
Eastern District of New York.

Filed. Dec. 31, 1931.

In obedience to the within Writ, I did, on the 23rd day of Dec., 1931. deliver to the warden of Leavenworth Prison at Kansas, the body of CHARLES L. MCNALLY I certify that at the same time I delivered to said warden a copy of the within Writ, showing to him this original.

Dated 30th Nov., 1931

FRED. S. PULVER,
U. S. Marshal,
Eastern District of New York.

I. M. ROSENBLUM D. U. S. Marshall.

PETITIONER'S EXHIBIT "D."

EASTERN DISTRICT OF NEW YORK, ss.

I, Percy G. B. Gilkes, Clerk of the District Court of the United States for the Eastern District of New York, do hereby certify that the ~~foregoing~~ annexed is a true copy of an original Writ of Commitment with marshals Return on file and remaining of record in my office.

In Testimony Whereof, I have caused the Seal of said Court to be hereunto affixed, at the Borough of Brooklyn, in the Eastern District of New York, this 13th day of December in the year of our Lord one thousand nine hundred and ~~twenty~~ thirty two and of the Independence of the United States the one hundred and ~~forty~~ fifty-seventh.

PERCY G. B. GILKES, *Clerk.*
By S. R. FEUER, *Deputy Clerk.*

WARRANT OF COMMITMENT

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Marshal of the United States for the Eastern District of New York, and to his Deputies or any or either of them, and the Attorney General or his authorized Representative.

GREETING:

WHEREAS, CHARLES L. MCNALLY, alias Charles McDermott, alias "Mack" now stands convicted before the District Court of the United States for the Eastern District of New York of having within the said District

on or about the 24th day of July, 1930, up to and including the 15th day of February, 1931, at the Borough of Brooklyn, County of Kings, City, State and Eastern District of New York, and within the jurisdiction of this Court, at the Borough of Manhattan, City, State and Southern District of New York, and in the City of Dallas, in the State of Texas, and in the State of New Jersey, and in divers other places to the Grand Jurors unknown, violated, Title 18, United States Code, Sections 88 and 408. (Transporting Stolen Motor Vehicle) contrary to the Statutes of the United States in such case made and provided;

AND WHEREAS, the said CHARLES L. MCNALLY, alias Charles McDermott, alias "Mack" was, on the 28th day of September, 1931, at the Borough of Brooklyn, City of New York, and State of New York, by virtue of said conviction, sentenced by the said Court to be imprisoned for the term of Two (2) years, without costs. the said sentence to be executed in a Penitentiary or Prison Camp and to date from the 10th day of December, 1931;

WITNESS, the Honorable MARCUS B. CAMPBELL, Judge of the District Court of the United States for the Eastern District of New York, and the seal of said Court, at the Borough of Brooklyn, City of New York, in the Eastern District of New York, this 10th day of December in the year of our Lord one thousand nine hundred and thirty-one

PERCY G. B. GILKES
Clerk.

By J. G. COCHRAN
Deputy Clerk.

Crim. #28945

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

The United States

vs.

Charles L. McNally, etc.

R

WRIT OF COMMITMENT

I hereby depute
to execute the within Writ

Dated , 192

.....
U. S. Marshal,
Eastern District of New York.

Filed Dec. 31, 1931.

In obedience to the within Writ, I did, on the 23rd day of Dec. 1931. deliver to the warden of Leavenworth Prison at Kansas the body of Chas. L. McNally etc I certify that at the same time I delivered to said warden a copy of the within Writ, showing to him this original.

Dated 10th Dec., 1931

FRED. S. PULVER
U. S. Marshal,
Eastern District of New York.

I. M. Rosenblum D. U. S. Marshall

CHRONOLOGY OF PROCEEDINGS IN NEW YORK COURT.

July 1, 1931. Before Inch J. Deft. arraigned plea not guilty bail fixed at $2000, ordered to return Aug. 5, 1931.

July 8, 1931. Deft. Baden arraigned, plea not guilty, bail fixed at $2500—ordered to return Aug. 5, 1931.

July 13, 1931. Inch J. Defts. Berman, McNally and Littman arraigned plea not guilty bail fixed at $3000—as to Berman, $2000 as to McNally and $5000—as to Littman. Defendants ordered to return Aug. 5, 1931 Defts. Hawkins, Murray, Beecker and Fioto not present, bench warrants ordered (Deft. Fioto arraigned plea not guilty bail fixed at $2500—ordered to return Aug. 5, 1931.

July 18, 1931. Before Galston J. Deft. Leahy arraigned plea not guilty. Bail fixed at $1000 ordered to return Aug. 5, 1931.

Aug. 5, 1931. Before Sheppard J. Defts. Berman, man, McNally, Baden, Littman, and Koch present ordered to return Sept. 2, 1931. Defts. Hawkins, Murray, Beecher, and Leahy not present defaults noted.

Sept. 2, 1931. Sheppard J.—Defts. Berman, McNally, Baden and Littman present ordered to return Oct. 7, 1931—Deft. Koch reported sick.

Oct. 7, 1931. Inch J. Defts. Berman, McNally, Baden, Littman and Leahy present ordered to return Oct. 22, 1931.

Oct. 22, 1931. Before Inch J. Defts. Berman, McNally, Baden, Littman, Koch and Leahy present ordered to return Oct. 30, 1931. Defts. Fioto not present.

Oct. 30, 1931. Before Inch J. Defts. Berman, McNally, Baden, Littman, Koch, Leahy and Fioto present ordered to return Nov. 16, 1931.

Nov. 16, 1931. Campbell J.—Case called Defts. Berman, McNally, Baden, Littman, Koch, Leahy, and Fioto present. Mr. Singer moves to sever the indictment as against Hawkins, Murray, Beecher and "John Doe". Motion granted. Indictment severed as against the defts.—Hawkins, Murray, Beecher and John Doe." Trial ordered as against Berman, McNally, Baden, Littman, Koch, Leahy and Fiota and adjourned to Nov. 17, 1931.

Nov. 17, 1931. Campbell, J. Case called, Defts. present, trial resumed and adjourned to November 18, 1931 at 10:45 A. M.

Nov. 18, 1931. Campbell J. Case called, Defts. on trial present, trial resumed and adjourned to Nov. 19, 1931.

Nov. 19, 1931. Campbell J. Case called, Defts. on trial present, trial resumed and adjourned to Nov. 20, 1931.

Nov. 20, 1931. Campbell, J. Case called, defts on trial present, trial resumed and adjourned to Nov. 21, 1931.

Nov. 21, 1931. Campbell J. Case called defts. on trial present, trial resumed. Mr. Cowan moves to dismiss the 1st count of the indictment as to all defts. Motion denied Mr. Cowin moves to dismiss the 2nd and 3rd counts of the indictment as to all defts. on consent of Mr. Singer the motion to dismiss 2nd count of the indictment as against Baden, Koch, Leahy, Fioto and Littman is granted, also on consent of Mr. Singer the motion to dismiss the 3rd count of the indictment as against Baden, Koch, Leahy, Fioto is granted and the motion to dismiss the 2nd and 3rd counts of the indictment as against Berman, McNally, is denied and also denied on the 3rd count as against Littman. Mr. Cowin moves to strike out certain testimony motion denied.
Mr. Cowan moves for the direction of an acquittal as against all defts. Motion denied as against the defts. Berman, McNally, Koch, Fioto, Baden, and Littman and granted as against Deft. Leahy, Jury render a verdict of not guilty as against the deft. Leahy by direction of the Court. Deft. Leahy discharged, trial adjourned to Nov. 23, 1931 at 10:00 a. m.

Nov. 23, 1931. Campbell J. case called—defts. on trial present trial resumed. Deft. Berman withdraws plea of not guilty and plea guilty to count #3. Mr. Singer moves to dismiss counts #1 and 2. Motion granted. Deft. Berman remanded to Nov. 30, 1931. Trial adjourned to Nov. 24, 1931.

Nov. 24, 1931. Campbell J. Case called, Defts. on trial present trial resumed and concluded Jury unable to reach a verdict at 11:00 P. M. declares a recess to Nov. 25, at 10:30 A. M.

Nov. 25, 1931. Campbell J. case called, defts. on trial present, jury return and render a verdict of guilty as to deft. McNally on 1st, 2nd and 3rd counts, guilty as to Deft. Littman on 1st and 3rd counts guilty as to Deft. Fioto on 1st count and not guilty as to Deft. Koch on 1st count and fail to agree as to deft. Baden. Mistrial declared as to Baden Jury discharged. Mr. Elegant moves to have Jury polled as to deft. Fioto. Jury polled and each render a verdict of guilty, Mr. Cowan moves to set aside verdict as to each deft. found guilty, Motion denied Mr. Cowin moves in arrest of judgment as to each deft. found guilty. Deft. Koch discharged. Defts. McNally, Littman and Fiota remanded to Nov. 30, 1931 for sentence. Deft. Baden continued on bail to Jan. 18, 1932.

Nov. 30, 1931. Before Campbell, J. Defts. Berman, McNally, Littman and Fioto present deft. Berman sentenced to be imprisoned for 4 years on count 3, at a Penitentiary or Prison Camp without costs. Deft. McNally sentenced to be imprisoned for 2 years on count one, 4 years on count two and 4 years on count three at a Penitentiary or Prison Camp without costs sentence on count one to run concurrently with sentence on count two and three sentence on counts two and three to run consecutively. Deft. Littman sentenced to be imprisoned for 2 years on 1st count and 3 and one half years on 3rd count at a Penitentiary or Prison Camp sentence on counts 1 and 3 to run concurrently without costs. Deft. Fioto sentenced to be imprisoned for 2 years at a Penitentiary or Prison Camp on count one without costs.
Writs of commitment issued.

Jan. 4, 1932. Moscowitz, J.—deft Hawkins arraigned plea not guilty bail fixed at $2500 ordered to return Jan. 18, 1932.

Jan. 18, 1932. Galston, J. Defts. Baden and Hawkins present ordered to return Jan. 26, 1932 Deft. Murray arraigned plea not guilty bail fixed at $7500—ordered to return Jan. 26, 1932.

Jan. 26, 1932. Galston J. Defts. Baden, Hawkins and Murray present ordered to return Feb. 3, 1932.

Feb. 3, 1932. Campbell J. Defts. Baden, Hawkins and Murray present ordered to return Mar. 17, 1932.

Mar. 17, 1932. Inch J. Defts. Baden and Murray present ordered to return Mar. 29, 1932.

Mar. 29, 1932. Inch J. Defts. Baden and Murray present ordered to return April 6, 1932.

Apr. 6, 1932. Moscowitz J. Defts. Baden and Murray present ordered to return April 25, 1932.

Apr. 25, 1932. Moscowitz J. Defts. Baden and Murray pres. ordered to ret. May 4.

May 4, 1932. Galston J. Defts. Baden and Murray present ordered to return July 1, 1932.

July 1, 1932. Inch J. Defts. Baden, Murray present ordered to return July 20, 1932.

July 12, 1932. Inch J. Deft. Beecher arraigned plea guilty to count one Asst. U. S. Att'y. Singer moves to dismiss Counts 2 and 3, motion granted sentence suspended deft. Beecher placed on probation for one year without costs.

July 20, 1932. Inch J. Deft. Baden and Murray present ordered to return Sept. 7, 1932.

Sept. 7, 1932. Moscowitz, J. Deft. present ordered to return Sept. 26, 1932.

Sept. 26, 1932. Moscowitz J.—Defts. Baden and Murray present ordered to return Oct. 14, 1932.

Oct. 14, 1932. Byers J. Defts. Baden and Murray present ordered to return Nov. 16, 1932.

Nov. 16, 1932. Inch J. Defts. Baden and Murray present Ass't. U. S. Attorney—Singer moves to dismiss indictment as against Baden and Murray motion granted—defts. Baden and Murray discharged.

ORDER.

(Filed May 16, 1933.)

And now, May 16, 1933, after hearing on the within petition and rule to show cause why a writ of habeas corpus should not issue, it appearing that the ground alleged in the petition is that the court in the Eastern District of New York did not have jurisdiction to impose sentence upon the petitioner after trial and conviction in the said Eastern District of New York upon the third count of indictment No. 28944 which said third count charges the sale of a motor vehicle in Jersey City, State of New Jersey, which motor vehicle had been stolen in the Borough of Brooklyn, Eastern District of New York, and transported in interstate commerce from the Borough of Brooklyn, Eastern District of New York to Jersey City in the State of New Jersey, in violation of Title 18 U. S. C. section 408. The Court is of the opinion that there is no merit to the said contention of the petitioner for the following reasons:

First.—The National Motor Vehicle Theft Act (18 U. S. C. 408) specifically provides that any viola-

tion of the act may be punished in any district in or through which such motor vehicle has been transported or removed, and the Eastern District of New York where the petitioner was tried, convicted and sentenced, was one of the districts which under the statute, had jurisdiction.

Second.—Section 4 of the National Motor Vehicle Theft Act specifically provides "whoever shall receive, conceal, store, barter, sell or dispose of any motor vehicle moving as or which is a part of or which constitutes Interstate or Foreign Commerce . . ." and the constitutionality of this provision being dependent upon the fact that such motor vehicle must be moving as, be a part of, or constitute interstate or foreign commerce, the crime therefore involves more than one state or district and Congress has power to enact legislation such as it did in this act providing that any person violating the act might be punished in any district in or through which such motor vehicle had been transported, or removed. The Eastern District of New York where the petitioner was tried, convicted and sentenced was, in this case, such a district.

Third.—Aside from the fact that the sale of a stolen motor vehicle to come within the commerce clause of the Constitution must involve interstate transportation, as set forth above, in this case the petitioner having gone to trial, been convicted and been sentenced, cannot now raise the question for the first time on a writ of habeas corpus and cannot now complain for the reason that the right to a trial by a jury in the State where the crime has been committed, as provided in article 3, section 2, clause 3, and in amendment 6 to the Constitution of the United States, is a right which the defendant may waive, and which in this case, the petitioner did waive even if the

jurisdiction was originally in the District Court of New Jersey as contended by the petitioner. Hagner et al. v. U. S., 54 F. (2d) 446; Patton v. U. S., 281 U. S. 276-299.

It is accordingly ordered that the petition be and the same is hereby dismissed and the rule granted thereon discharged.

ALBERT W. JOHNSON,
United States District Judge.

ASSIGNMENT OF ERRORS.

(Filed August 11, 1933.)

To the Honorable the Judges of the Circuit Court:

Now, this eleventh day of August, 1933, comes Charles L. McNally, by his attorney, Nathan Fink, Esq., and in connection with his petition for an appeal herein says that in the aforesaid order manifest error has intervened to his prejudice, to wit:

First.—The Court erred in making the following order, to wit:

> "It is accordingly ordered that the petition be and the same is hereby dismissed and the rule granted thereon is discharged.
>
> ALBERT W. JOHNSON,
> *United States District Judge.*"

Second.—The Court erred in not issuing the writ of habeas corpus and not discharging the petitioner from the custody of the warden of the aforesaid penitentiary as to the service of the alleged invalid sentence of four years imprisonment on count three of indictment No. 28944, as prayed for in said petition.

WHEREFORE, the appellant prays that the order of the United States District Court in and for the Middle District of Pennsylvania, made and entered herein in the office of the clerk of the said court on May 16, 1933, discharging the order to show cause and dismissing the petition for a writ of habeas corpus, be reversed, and that the cause be remitted to the said lower court with instructions to discharge the said Charles L. McNally from the custody of the said warden of the aforesaid penitentiary as to the service of the invalid sentence of four years imprisonment imposed upon count three of indictment No. 28944, by directing the issuance of a writ of habeas corpus, as prayed for in said petition.

NATHAN FINK,
Attorney for Appellant.

Dated August 11, 1933.

CITATION.

(Filed August 25, 1933.)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

UNITED STATES OF AMERICA, *ss.:*

THE PRESIDENT OF THE UNITED STATES,

To Henry C. Hill, Warden, United States Penitentiary, Lewisburg, Pennsylvania,

GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Third Circuit, to be holden at the City of Philadelphia on the first Monday of October, 1933, pursuant to appeal and assignment of errors filed in the Office of the Clerk of the District Court of the United States for the Middle District of Pennsylvania, wherein Charles L. McNally is the appellant and you are the appellee, to show cause, if any there be, why the order rendered against said Charles L. McNally, as in the said appeal and assignment of errors mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf, and to receive and abide by such order as said United States Circuit Court of Appeals for the Third Circuit may see fit to make in the premises. This citation returnable within thirty days from the date hereof.

WITNESS, Hon. Albert W. Johnson, Judge of the United States District Court in and for the Middle District of Pennsylvania, this twenty-fifth day of August, 1933.

(Seal)

S. W. HOFFORD,
Clerk.

By H. F. KAUFMAN,
Deputy Clerk.

Now August 25, 1933, service admitted and copy received of the within citation.

H. C. HILL.

IN THE
UNITED STATES CIRCUIT COURT
OF APPEALS
FOR THE THIRD CIRCUIT
No. 5257. October Term, 1933

CHARLES L. McNALLY,
Appellant,

vs.

HENRY C. HILL, WARDEN OF UNITED STATES PENITENTIARY, LEWISBURG, PA.,
Appellee.

And afterwards, to wit, the 3d day of November, 1933 come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable Victor B. Woolley and Honorable J. Warren Davis, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 13th day of February, 1934 come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

OPINION.

(Filed February 13, 1934.)

Before BUFFINGTON, WOOLLEY and DAVIS, *Circuit Judges.*

WOOLLEY, *Circuit Judge.*

McNally, with others, was tried, convicted and, upon nearby days, was sentenced on all counts of two indictments framed under the Conspiracy Act and the National Motor Vehicle Theft Act, Sections 1-5 of the

Act of October 29, 1919, 41 Stat. 324, embodied in Section 408 of Title 18 U. S. C. A. Submitting to imprisonment without appeal, McNally has not complained of the sentence of two years' imprisonment imposed under one indictment containing one count which charged conspiracy to violate the cited statute, nor has he excepted in any way to the sentences under the first and second counts of the other indictment which imposed penalties of imprisonment for two and four years to run concurrently, but now, as the longest of the first three sentences is approaching its end, he has filed in the District Court a petition for a writ of habeas corpus and complains grievously of the sentence imposed under the third count of the latter indictment which called for imprisonment for a term of four years to run consecutively with the other two terms, thus extending the aggregate of the sentences from four to eight years. By his petition, he seeks release from the sentence under the third count on the ground that, thereunder, the court had no jurisdiction to try him and none to impose sentence upon him. He bases this contention on the allegation that the count does not charge an offense under the National Motor Vehicle Theft Act in that it alleges that he, with others, sold in New Jersey a motor vehicle which "had theretofore been transported in interstate commerce (from New York to New Jersey), which had theretofore been stolen from the true owner (in New York), the said defendants knowing that said car so sold as aforesaid had been stolen and transported in interstate commerce contrary" to the cited statute. In a word, his contention is that the sale in New Jersey was of a stolen motor vehicle not shown, as required by the statute, to be a part of or moving in interstate commerce at the time of sale and therefore the offense, if any, was against the law of New Jersey, triable only by a court of that state, and that his trial by a federal

district court in New York was invalid because in violation of Clause 3, Section 2 of Article III of the Constitution of the United States, which provides that: "The trial of all crimes . . . shall be held in the state where the said crime shall have been committed . . . " The learned district judge, holding that the federal trial court had jurisdiction, denied the petition and the relator, McNally, has taken this appeal which we shall entertain without committing ourselves on the question whether or not this proceeding for a writ of habeas corpus is an attempted substitute for an appeal from the judgment of sentence.

The pertinent provisions of the applicable federal statute are these:

> "Sec. 3. That whoever shall transport or cause to be transported in interstate or foreign commerce a motor vehicle, knowing the same to have been stolen, shall be punished . . . "
>
> "Sec. 4. That whoever shall receive, conceal, store, barter, sell, or dispose of any motor vehicle, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be punished . . . "
>
> "Sec. 5. That any person violating this Act may be punished in any district in or through which such motor vehicle has been transported or removed by such offender."

The purpose of this Act, obvious on reading it and tersely stated by Mr. Chief Justice Taft in Brooks v. United States, 267 U. S. 432, 488, was to put an end to elaborately organized schemes for the theft of automobiles, ordinarily successful because of the speed with which the stolen property can, by its own power, be moved into distant police jurisdictions and made difficult of detection by that very fact.

Adverting to the fourth section of the Act, the one here in question, the Chief Justice remarked in

the Brooks case that it made "more effective the regulation contained in the third section." The third section punishes the transportation of a stolen automobile with knowledge of the theft. The fourth section punishes the receipt, the concealment, the storing, the bartering, the sale, or the disposition of such stolen vehicle, moving as interstate commerce, or as a part thereof, with knowledge of its having been stolen. Of course, this section can and does apply only to the storing or concealment (and, we think, he meant that it applies also to the other specifically forbidden acts of receipt, barter, and sale as distinguished from transportation) of a stolen automobile with knowledge of its theft, as a *final step* in the use of interstate transportation to promote the scheme of its unlawful disposition and the withholding of it from its owner.

It is clear that the Act, purposely made comprehensive so as to curb the far flung offenses to which it is directed, is based on the interstate commerce clause of the Constitution and it is equally clear that to confer jurisdiction upon a court the indictment must show the interstate character of the offending transaction, which in this case was a sale. An indictment which merely shows the sale of stolen property does not conform to the statute and does not confer jurisdiction on a federal district court.

But the statute, in order to cover the whole of the vicious practice, has defined two offenses: one, the transportation in interstate commerce of a stolen motor vehicle, which is complete without sale; the other, the receipt, sale or disposition of a stolen motor vehicle, possessing the requisite characteristic of interstate commerce, describing it in these words: "Any motor vehicle, moving as, or which is a part of, or which constitutes interstate or foreign commerce." Thus, by the two sections, the statute forbids and punishes the transportation and sale of a stolen motor vehicle in

interstate commerce from its inception by theft to its termination by sale, yet even in the sale clause (section 4) the transaction must, of course, partake of or have the characteristic of interstate commerce as a necessary jurisdictional ingredient. This, the relator says, is lacking in the third count of the indictment because it charges him, in the past tense, with the sale of a motor vehicle which (having theretofore been stolen in New York) "had theretofore been transported in interstate commerce" (from New York to New Jersey) indicating, he says, that on arriving in New Jersey it lost its characteristic of interstate commerce and thereafter became the subject of larceny and of prosecution for larceny under the laws of New Jersey alone.

Looking at the subject matter of the statute, it is certain there comes a time in the transportation of a stolen motor vehicle from one state to another when, reaching its journey's end, the motor vehicle stops and transportation ceases. If, at that moment, it loses its quality of "moving as" or "which is a part of", or "which constitutes" interstate commerce, then always would it be impossible to enforce the fourth section of the statute against the concealment or sale of a car so described. Plainly, the statute contemplates a situation where the sale is an incident to something that has gone before, the "final step" of several that have preceded it, such as theft and transportation, and when the sale is so tied up with the interstate transportation in furtherance of the scheme unlawfully to dispose of the stolen vehicle and constitutes the last step thereof, the characteristic of interstate commerce is preserved and the federal jurisdiction for trying the offense of sale is maintained. Section 4. This must be true, for the Congress meant something by prescribing as an offense the sale of a stolen motor vehicle which is impressed with the characteristic of

interstate commerce. Manifestly it did not, by the fourth section of the Act dealing with sale of an unlawfully transported motor vehicle, intend the absurd thing of denouncing a sale only when the wheels of the vehicle are turning in interstate transportation. Forbidding the sale of a stolen vehicle only when actually in transit or in motion or in flight is not sense. The Congress intended a sale of a stolen motor vehicle which, having been unlawfully moved in interstate commerce and coming to rest, continues so closely related to that commerce as to remain "as a part of" it. When an indictment and the proofs show such to be the fact, the statute gives jurisdiction to a federal district court to try the case and punish the offender, not exclusively in the jurisdiction where the transaction was completed by sale, or in the jurisdiction in which it had its inception by theft, but "in any district in or through which the motor vehicle has been transported." Section 5. This grant of jurisdiction to any one of several district courts is predicated upon and justified by the very character of the offenses of transportation and of sale, neither of which, as defined by the qualifying words, is limited to one district. Each spreads through two or more districts. The offense, however extensive territorially and however complicated actually, are in each case but one offense and when proved to have the interstate characteristic, it is, under the statute and within the sense of the legislative problem, triable in any district through which, in part, it was perpetrated.

Applying these observations to the averments of the third count of the indictment in this case as affecting interstate commerce, which are very similar, indeed almost identical, with those which were involved in United States v. Drexel, 56 Fed. (2d) 588, we are of opinion, in accord with the Circuit Court of Appeals for the Second Circuit, that the allegation, in

the past tense, that the stolen motor vehicle had, before the sale, been transported in interstate commerce, was, if a defect, rather one of form than of substance under Section 556 of Title 18 U. S. C. A., and we are also of opinion, in accord with the thought in the Drexel case, that at any rate "within Section 391 of Title 28 of U. S. C. A. (28 U. S. C. A. Sec. 391) if not strictly a formal it was certainly a 'technical defect' which did not 'affect the substantial rights of the parties'. The pleader had been inept in expressing his meaning but that meaning was clear."

The third count of the indictment in this case shows that the characteristic of interstate commerce remained in the vehicle at the time of sale. The facts were, we assume from the verdict and in default of an appeal, proved at the trial. It is, on the verdict, not disputed that the car was stolen in one district, transported to another district, there, without change of character, received by the relator, knowing it to have been stolen and transported, and by him sold, thus bringing the case on the averments of the count and on the proofs within the jurisdiction of the court that tried him.

The order denying the petition for writ of habeas corpus is affirmed.

A true Copy:

Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

ORDER.

Appeal from the District Court of the United States, for the Middle District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Middle District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the order of the said District Court denying the petition for a writ of habeas corpus in this cause be, and the same is hereby affirmed.

Philadelphia,
February 13, 1934

VICTOR B. WOOLLEY
Circuit Judge

Endorsements—

Order Affirming Order, etc.
Rec'd & Filed Feb. 13, 1934

WM. P. ROWLAND, Clerk

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, } Sct.
Third Judicial Circuit.

I. WM. P. ROWLAND, Clerk of the United States Circuit Court of Appeals, for the Third Circuit, DO HEREBY CERTIFY the foregoing to be a true and faithful copy of the original Transcript of Record and proceedings in this Court in the case of—

Charles L. McNally,
Appellant,

vs.

Henry C. Hill, Warden of United States Penitentiary, Lewisburg, Pa.,
Appellee

No. 5257

on file, and now remaining among the records of the said Court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed by name and affixed the seal of the said Court, at Philadelphia, this 6th day of March, in the year of our Lord one thousand nine hundred and thirty-four and of the Independence of the United States the one hundred and fifty-eighth.

[SEAL]

WM. P. ROWLAND
Clerk of the United States Circuit Court of Appeals, Third Circuit.

[fol. 62] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 7, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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Supreme Court of the United States

CHARLES L. MCNALLY,
Petitioner-Appellant,

against

HENRY C. HILL, Warden, United States Northeastern Penitentiary, Lewisburg, Pa.,
Respondent-Appellee.

Petitioner, by his attorney, John S. Wise, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit, entered in the above entitled case on the 13th day of February, 1934.

Questions Presented.

I. Can the National Motor Vehicle Theft Act (also called the Dyer Act), Section 1-5 of the Act of October 29, 1919, 41 Stat. 324, embodied in Section 408 of Title 18, U. S. C. A., confer jurisdiction upon a District Court of the United States to impose a sentence of imprisonment upon a defendant under an indictment for the sale of an automobile theretofore stolen and transported in Interstate Commerce after the automobile had arrived in another State and was no longer in the category of the statute: "moving as, or which is a part of, or which constitutes interstate or foreign commerce"?

II. Has the District Court of the United States for the Eastern District of New York jurisdiction to try and sentence to imprisonment a citizen charged with the sale in the State of New Jersey of an automobile theretofore transported in interstate commerce into the State of New Jersey?

Statement.

The petitioner, Charles L. McNally, was indicted in the District Court of the United States for the Eastern District of New York at the June Term, 1931, on charges of violation of Title 18 U. S. C. A., Sections 88 and 409. There were two indictments, No. 28944, containing three counts, and No. 28945, containing one count. Petitioner was tried and found guilty on both indictments on all counts and sentenced to the United States Penitentiary to serve concurrent terms of two and four years on counts one and two of indictment 28944 and two years on indictment No. 28945, which, because of its date of commencement, beginning approximately at the same date as counts one and two in indictment No. 28944, was practically a concurrent sentence.

On count three of indictment No. 28944, appellant was sentenced to an additional four years to be served consecutively to the sentences under counts one and two of indictment No. 28944, making an aggregate sentence of eight years.

While serving his sentence in the United States Penitentiary at Lewisburg petitioner on April 6, 1933, petitioned the District Court of the United States for the Western District of Pennsylvania for a writ of habeas corpus, alleging that the sentence of four years on count three of the indictment No. 28944 was invalid and void because that count in charging defendant sold a stolen automobile in Jersey City, in the State of New Jersey, charged the defen-

dant with no crime of which the Federal Court had jurisdiction and alleging that the verdict, judgment, sentence and commitment under which he is now being held to serve the four year sentence imposed by the District Court upon the third count of indictment No. 28944 was imposed by the Court without power, authority or jurisdiction (Transcript of Record, pp. 6-7). His petition of habeas corpus was denied. He appealed to the Circuit Court of Appeals for the Third Circuit, and the denial of his petition was affirmed by that court, and he is now held in custody by the appellee below, Henry C. Hill, warden.

Specifications of Errors to be Urged.

The errors which petitioner alleges as grounds for the granting of the writ of certiorari and for reversal of the judgment of the Circuit Court of Appeals for the Third Circuit are:

1. The Circuit Court of Appeals erred in affirming the order of the Court below, denying the petition for writ of habeas corpus.

2. The Court erred in holding that the District Court for the Eastern District of New York had jurisdiction to try and sentence petitioner on an indictment which charged petitioner with selling a motor vehicle in the State of New Jersey, which had been stolen in New York and theretofore transported in interstate commerce from Brooklyn, New York, to Jersey City, in the State of New Jersey.

3. The Court erred in holding that the third count of the indictment No. 28944 showed that the characteristic of interstate commerce remained in the vehicle at the time of sale, when the indictment, in exact words, states that the

"• • • said motor vehicle *had theretofore* been transported in interstate commerce from the Borough of Brooklyn, County of Kings, City, State and Eastern District of New York, to Jersey City, in the State of New Jersey." (Italics ours.)

Reasons for Granting the Writ.

The decision of the Circuit Court of Appeals for the Third Circuit in the instant case is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Grimsley* v. *U. S.*, 50 F. (2) 509.

The decision is in conflict with the decision of the District Court, Northern District of Georgia, Atlanta Division, in the case of *Ventimiglia* v. *Aderhold*, 51 F. (2) 318.

The decision is in conflict with the Circuit Court of Appeals of the United States for the Second Circuit in the case of *U. S.* v. *Drexel*, 56 F. (2) 588.

The decision is in conflict with the provision of the Constitution of the United States, Article 3, Section 2, Clause 3, prohibiting the trial of the defendant outside of the District in which the alleged offense was committed.

The decision is also in conflict with the Constitution of the United States in that it holds the District Court of the United States has power to try and sentence a defendant upon an indictment which charges an offense against the laws of a State only and no offense against the statutes of the United States.

The decision here sought to be reviewed on certiorari puts the Circuit Court of Appeals of the United States for the Third Circuit on an important question of criminal law on a basis different from that accepted by any other Circuit of the United States in which the question has arisen.

The question involved in this case is one of federal law and jurisdiction, which, by this decision is unsettled.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Third Circuit should be granted.

Dated, March 27, 1934.

JOHN S. WISE, JR.,
Attorney for Petitioner,
27 Cedar Street,
New York, N. Y.

UNITED STATES OF AMERICA,
STATE AND SOUTHERN DISTRICT OF NEW YORK, ss:

JOHN S. WISE, JR., being duly sworn, says that he is a member of bar of the Supreme Court of the United States, is the attorney for the petitioner herein, and is duly authorized by said petitioner to make and execute this petition on his behalf; that he has read the foregoing petition and knows the contents thereof, and that the matters therein stated are true to the best of his knowledge, information, and belief. Deponent certifies that he has examined the foregoing petition and the record herein, and that in his opinion it is well founded, meritorious, and entitled to the favorable consideration of the Court.

JNO. S. WISE, JR.

Sworn to before me this
27 day of March, 1934.

SEYMOUR JOSEPH
Notary Public N. Y. Co. No. 97 Reg. No. 5-J-44
Commission expires March 30, 1935

BRIEF IN SUPPORT OF PETITION.

POINT I.

The indictment charges no crime under the laws of the United States.

The third count on No. 29844 is as follows:

> "• • • on or about the 12th day of February, 1930, at Jersey City, in the State of New Jersey did unlawfully, knowingly, and wilfully, **SELL** a certain motor vehicle, to wit: a Lincoln Sedan, 1929 model, original motor number 59638, original serial number 59638, which said motor vehicle had **THERETOFORE** been **transported** in interstate commerce, from the Borough of Brooklyn, County of Kings, City, State and Eastern District of New York, to Jersey City, in the State of New Jersey, and which said motor vehicle had theretofore been stolen from the true owner thereof, on or about the 14th day of December, 1929, at the Borough of Brooklyn, County of Kings, City, State and Eastern District of New York, the said defendants knowing that the said car so sold as aforesaid, **had been** stolen and **transported** in interstate commerce; against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided (Title 18, United States Code, Section 408)." (Caps ours.) (Record, p. 22.)

In the case of *U. S.* v. *Drexel* (C. C. A. 2) 56 Fed. (2) 588, the Court was considering a case of receiving and concealing an automobile stolen and then transported in interstate commerce.

In such a case the Court seemed willing to sustain an indictment on a presumption that it was received in interstate commerce, though the indictment did not expressly so state, but in sustaining that indictment, it definitely and distinctly stated it was:

> "• • • not within Grimsley vs. U. S. 50 F. (2d) 509 (CC5) where the indictment was wholly bare of the necessary allegations though guilty knowledge had been properly laid."

In the *Grimsley* case, the count of the indictment reads:

> "then and there unlawfully and feloniously, did sell a certain motor vehicle, to wit a Ford Sedan • • • then and there well knowing the same to have been transported in interstate commerce, • • • and then and there well knowing the same to have theretofore been stolen;"

This is practically a paraphrase of the count here under consideration but in its language is not so definitely a statement the vehicle was not in interstate commerce when sold. The Court says:

> "It is an essential element of the offense under the fourth section that the accused receive the motor vehicle while it is moving, as, or is a part of, or constitutes, interstate commerce. The act, as is apparent on the face of it, is based upon the commerce clause of the Constitution, and does not assume to punish one who receives or sells a stolen motor vehicle after it has ceased to move in, or be a part of interstate or foreign commerce. Brooks vs. United States, 167 U. S. 432, 45 S. Ct. 345, 69 L. Ed. 699, 37 A. L. R. 1407. This essential element was not alleged in the indictments under consideration."

Grimsley v. *United States*, 50 F. (2d) 509.

> "It is true that each appellant was charged with knowledge that the automobile which it was alleged he received and sold had been previously transported in interstate commerce; but for all that appears in either indictment, *such transportation had come to an end and the automobile had come to rest in Florida long before the accused received or sold it*" (*id.*, p. 510). (Italics ours.)

Proceeding, the Court says:

> "The indictments, under the most liberal interpretation, charged only the ordinary offense against the state law of receiving stolen goods with knowledge that they had been stolen; they failed to charge directly or even by implication, an offense within the jurisdiction of the Federal District Court. An indictment is fatally defective which omits an essential element of the offence sought to be charged. Evans vs. United States, 153 U. S. 584."

The count here is more preclusive of the allegations required by the Statute than that in the *Grimsley* case.

There is no possibility of implying from the language used in the indictment here that the automobile sold was "moving as" or constituted a part of interstate commerce. The automobile is described here:

> "• • • which said motor vehicle had *theretofore been transported in interstate commerce.*"

We repeat, in the *Grimsley* case the Court said:

> "The act, as is apparent on the face of it, is based upon the Commerce Clause of the Constitution, and does not assume to punish one who receives or sells a stolen motor vehicle after it has ceased to move in, or be a part of interstate or foreign commerce. Brooks v. United States, 267 U. S. 432 • • •

> The essential element was not alleged in the indictment under consideration."

In the *Drexel* case the Court pointed out that the allegation that the motor vehicle was in interstate commerce at the time of its receipt and concealment, was indispensable, saying:

> "And it must be confessed that a strict construction would make the indictment defective since it was an essential element of the crime, one indeed without which the statute would extend beyond its constitutional scope, that the car should not have lost its character as a part of interstate commerce. If so construed, an error arises on the face of the record which was not cured by failure to object *in limine*."

An indictment must be strictly construed.

In *Brooks* v. *U. S.*, 267 U. S. 432, the Court said:

> "Of course this section can and does apply only to the storing and concealment of a stolen automobile with knowledge of its theft as a final step in the use of interstate commerce."

It will be observed that the language in the *Grimsley* case was

> "did sell a certain motor vehicle • • • then and there knowing the same to have been transported in interstate commerce • • •."

The language here is:

> "• • • which said motor vehicle had *theretofore* been transported."

This language precludes any suggestion that the car was in interstate commerce, when sold, and affirmatively alleges

that its movement in interstate commerce had ceased sometime prior to the sale.

The learned Court below says:

> "The Congress intended a sale of a stolen motor vehicle, which, having been unlawfully moved in interstate commerce and coming to rest, continued so closely related to that commerce as to remain 'a part of it'" (Opinion, p. 6).

But is it to be supposed Congress tried to enact a fiction that a *car that had theretofore* been transported in interstate commerce should be deemed to continue in interstate commerce indefinitely?

It is not a matter of what the Court might think Congress intended by the act, but a matter of what power Congress had to pass a statute to effect that purpose, if such was its purpose. Until this decision, it has been recognized and uniformly decided that when a car had come to rest in a state and ceased to be moving in interstate commerce, it ceased to be a part of interstate commerce, and Congress is without power to make its subsequent sale a crime. Congress did not pass an act providing that the sale of a car which had theretofore been transported in interstate commerce should be a crime. The statute reads:

> "Whoever shall • • • barter, sell or dispose of *any motor vehicle, moving as, or which is a part of, or which constitutes interstate commerce,* knowing the same to have been stolen, shall be punished • • •."

It positively precludes a crime being predicated upon the sale of an automobile which had theretofore been transported in interstate commerce. This was recognized in *Davidson* v. *U. S.*, 61 Fed. (2) 250, in the Fifth Circuit, where the Court said:

> "It is of course an indispensable ingredient of the offense that the car, at the time it was • • • sold or disposed of, was moving as, or was part of or constituted interstate commerce."

There Davidson was accused of selling a car that had been brought from Oklahoma to Kansas City by others sometime before the sale, and the Court said:

> "There is entirely omitted from the indictment any charge to the effect that the vehicle, at the time it is charged to have been received, concealed or stored, was moving as, or that it constituted interstate or foreign commerce. *It is no offense against any federal statute to receive or conceal or to store a car that has been stolen nor was it material that at some time the property had been transported in interstate commerce. It is essential to the offense that the property at the time it is charged that the defendant received and stored it, was moving, or was part of, interstate commerce.*" (Italics ours.)

The Court further said:

> "It cannot be said that the defect is one of form and not of substance. Manifestly, if this car was not in interstate commerce when received, the federal court has no jurisdiction, and the very language employed in the indictment negatives any inference that the car was part of interstate commerce at the time it was received and stored."

Davidson v. *United States*, 61 F. (2) 251 p. 256, C. C. A. (8th Circuit).

If this is true of receipt and storage, which may by implication be inferred to have been committed as an incident to transport, how much more is it true when applied to a *sale of property* which had *theretofore been transported in interstate commerce.*

POINT II.

(a) The omission of allegation that the car was in interstate commerce when sold is fatal to the indictment;

(b) Conviction under it gave the Court no jurisdiction to impose the sentence;

(c) And the question did not have to be raised *in limine*.

(a) That an indictment to be a basis for conviction of a crime must allege all the essential elements of a crime, is fundamental.

> *Grimsley* v. *U. S.*, 50 F.(2) 509 (C. C. A. 5);
> *Sonnenberg* v. *U. S.*, 264 Fed. 327;
> *Wong Tai* v. *U. S.*, 273 U. S. 80;
> *U. S.* v. *Drexel*, 56 F.(2) 588.

(b) The cases above cited will support the statement that if the indictment charged no crime, the Court had no jurisdiction to impose a sentence upon a verdict of guilty of such charge.

(c) In *Grimsley* v. *U. S.*, where the count of the indictment failed to charge that the car at the time of sale was in interstate commerce, it was held the conviction could not be sustained.

> "and this even in the absence of an attack of any kind upon the indictment in the Court below; Sonnenberg vs. U. S. 264 Fed. 327."
>
> *Grimsley* v. *U. S.*, *supra*.

The same was held in the case of *Ventimiglia* v. *Aderhold*, 51 Fed. (2) 308 (D. C. Georgia); *Davidson* v. *U. S.*, 61 F(2) 250 (C. C. A. 8).

In *U. S.* v. *Drexel* (C. C. A. 2), 56 Fed. (2) 588, referring to such a defective indictment, the Court says:

> "If so construed, an error arises on the face of the record, which was not cured by failure to object in limine. U. S. v. Carll, 105 U. S. 611, • • • Shilter vs. U. S. 257 F. 724 (C. C. A. 9); Dropps vs. U. S. 34 F.(2d) 15 (C. C. A. 8); Hardesty vs. U. S., 168 F.25 (C. C. A. 6); Grimsley vs. U. S., 50 F.(2d) 509 (C. C. A. 5). Moreover, no exception was necessary to raise it; it is open on mere appeal. Nalle vs. Oyster, 230 U. S. 165, 33 S. Ct. 1043, 57 L. Ed. 1439; Brown v. Carver, 45 F.(2d) 673, 674 (C. C. A. 8)."

POINT III.

The District Court of the United States for the Eastern District of New York had no jurisdiction to try or sentence the petitioner for the sale of an automobile in New Jersey.

Ventimiglia v. *Aderhold, supra;*
Brooks v. *U. S.*, 67 U. S. 432;
Grimsley v. *U. S.*, 50 F.(2d) 509;
Davidson v. *U. S.*, 61 F. (2d) 250 (C. C. A. 8).

In all these cases it has been held that the sale of an automobile in a State, though it may have been transported in interstate commerce was not a violation of the National Automobile Theft Act.

If after an automobile has ceased to move in or be a part of interstate commerce, the Dyer Act may be applied, there is no reason why the statute should not be held to attaint forever, a car once stolen and transported in interstate commerce, so that anybody who ever sells it thereafter may be convicted of the crime.

POINT IV.

The Certiorari Should Issue.

The decision in the case at bar holds a defendant may be tried, convicted and sentenced in a District Court of the United States on an indictment which charges an offense against a State other than that of the district in which he is tried, and charges no crime against the laws of the United States.

It is in conflict with the decisions above quoted in the Second, Fifth and Eighth Circuits of the United States Circuit Court of Appeals. We respectfully submit that the Writ of Certiorari prayed for should be granted and this Court should review and reverse the decision in this case which makes such conflict.

POINT V.

Petitioner was entitled to his writ of habeas corpus upon his petition in the lower Court and to his discharge thereunder, and the courts below should be reversed.

Respectfully submitted,

JOHN S. WISE, JR.,
Attorney for Petitioner,
27 Cedar Street,
New York City.

IN THE

Supreme Court of the United States

October Term, 1933

No. 914

CHARLES L. MCNALLY, *Petitioner,*

v.

HENRY C. HILL, Warden of United States Northeastern Penitentiary, Lewisburg, Pennsylvania.

ON PITITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF FOR PETITIONER.

The argument of the Solicitor General is that because in some other cases omissions or inept allegations of some facts have been held immaterial, the indictment in the present case is good, because its purpose can be imagined from other allegations, *dehors* the count.

We submit his arguments are not good for the reasons:

(1) A count, to be good, must be complete within its own terms.

(2) The count here does not merely omit facts, but states that no crime within the Federal Statutes was committed, because the automobile sold had

been theretofore transported in interstate commerce, which is an affirmative allegation that at the time of its sale it was **not** in interstate commerce.

The Solicitor General argues the points here raised were not raised below. On page seven of his brief, in the foot note, he recites that the docket entries in the record show a motion to dismiss the count here involved was duly made at trial, and a motion in arrest of judgment was duly made.

Thus these questions were raised, and if the indictment was inadequate to charge a crime, both motions should have been granted.

The application for habeas corpus challenged the jurisdiction to impose the sentence and raised these questions.

The habeas corpus here does not constitute a collateral attack upon the record of the judgment, but attacks the jurisdiction of the Trial Court to impose the sentence by reason of both the inadequacy of the indictment to allege a crime and the jurisdiction of the Court to try the crime supposed to be charged.

Such issues cannot be waived.

Even a consent to the judgment cannot give the Court jurisdiction or deprive the petitioner of his right to discharge by habeas corpus on an illegal detention. This Court cannot acquire jurisdiction to incarcerate a citizen by waiver or consent.

Mayer v. *U. S.*, 235 U. S. 55.

The Solicitor General on page nine of his brief admits that the Circuit Court of Appeals of the Fifth and Eighth

Circuits have decided the law of this case differently from this decision of the Third Circuit.

In the circumstances it would seem extremely important that this Court grant the writ and **settle the law.**

The argument that the subject cannot be brought up on habeas corpus is specious for it involves the liberty of a citizen which cannot be disposed of by refinements of procedure.

Ventimiglia v. *Aderhold*, 51 F. (2d) 309.

This was a habeas corpus proceeding and involved the precise question as here and under the same statute.

The Solicitor General states the contrary in his brief (p. 10) but he would seem to be in error.

The petitioner is entitled to the grant of the writ of certiorari and to his discharge.

Respectfully submitted,

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Attorney for Petitioner,
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New York City.

May, 1934.

IN THE

Supreme Court of the United States

October Term, 1934

No. 15

CHARLES L. MCNALLY,
Petitioner,

v.

HENRY C. HILL, Warden, United States Northeastern Penitentiary, Lewisburg, Pennsylvania.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE PETITIONER.

Petitioner rests upon his brief in support of petition for certiorari herein and upon his brief in reply to respondent's brief opposing issuance of writ of certiorari upon which this case is reviewed.

Notwithstanding the arguments of the respondent, all the questions of law were raised on the motion in arrest of judgment. On this motion the jurisdiction of the Court to sentence was raised. The count of the indictment here challenged did not give the Court jurisdiction to try the defendant or to sentence him. For the purposes of this proceeding, it may be conceded the pleader was attempting to allege a crime within the statute, but the indictment does not allege a crime.

The Court cannot get jurisdiction to try and sentence on a prosecutor's attempt to plead a crime. It can get jurisdiction only when the prosecutor pleads a crime.

No determination of the Court below can preclude this Court from its duty to discharge a prisoner who is sentenced without jurisdiction by the Court below.

We respectfully submit that under the *Grimsley* case, the *Davidson* case, the *Brooks* case and the *Ventimiglia* case cited in Point III, page 14, of the petitioner's brief in support of the petition for certiorari, the petitioner is entitled to his discharge.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 914

CHARLES L. MCNALLY, PETITIONER

v.

HENRY C. HILL, WARDEN OF UNITED STATES NORTHEASTERN PENITENTIARY, LEWISBURG, PENNSYLVANIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 47–49) has not been reported. The opinion of the Circuit Court of Appeals (R. 53–59) is reported in 69 F. (2d) 38.

JURISDICTION

The judgment sought to be reviewed was entered February 13, 1934 (R. 60). The petition for writ of certiorari was filed March 31, 1934. While petitioner does not so state, he presumably invokes the

jurisdiction of this Court under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The two questions which the petitioner states are presented by his petition for writ of certiorari may be thus restated as one question:

Whether the petitioner is entitled to be relieved on habeas corpus from serving the sentence imposed upon the third count of one of the two indictments upon which he was convicted, because that count charged him with having unlawfully sold a stolen motor vehicle which "had theretofore been transported in interstate commerce", instead of charging him, in the language of the National Motor Vehicle Theft Act, with having sold a stolen motor vehicle "moving as, or which is a part of, or which constitutes interstate commerce."

STATUTE INVOLVED

Sections 4 and 5 of the National Motor Vehicle Theft Act (Act of October 29, 1919), c. 89, 41 Stat. 324, 325 (U.S.C., Title 18, Sec. 408), read as follows:

> SEC. 4. That whoever shall receive, conceal, store, barter, sell, or dispose of any motor vehicle, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be punished by a fine of not more

than $5,000, or by imprisonment of not more than five years, or both.

SEC. 5. That any person violating this Act may be punished in any district in or through which such motor vehicle has been transported or removed by such offender.

STATEMENT

Two indictments, one containing three counts and another containing a single count, were returned against the petitioner in the District Court of the United States for the Eastern District of New York. The first count of the indictment containing three counts, which will hereafter, for purposes of brevity, be called Indictment 28944, charged petitioner and others with conspiring to transport a number of stolen automobiles in interstate commerce and with conspiring to receive, conceal, barter, and sell the automobiles so transported (R. 12–20). The second count charged the defendants with the interstate transportation of a stolen motor vehicle (R. 20–21). The third count, which is the one here involved, charged that (R. 22–23):

> the defendants, on or about the 12th day of February 1930, at Jersey City, in the State of New Jersey, did unlawfully, knowingly, and wilfully, sell a certain motor vehicle, to wit: a Lincoln Sedan, 1929 model, original motor number 59638, original serial number 59638, which said motor vehicle had theretofore been transported in interstate com-

> merce, from the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York, to Jersey City, in the State of New Jersey, and which said motor vehicle had theretofore been stolen from the true owner thereof, on or about the 14th day of December 1929, at the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York, the said defendants knowing that the said car so stolen as aforesaid, had been stolen and transported in interstate commerce; * * *

It is charged in overt act one, of the conspiracy count, that the same vehicle was transported by the defendants from Brooklyn, N.Y., to Jersey City, N.J., on February 3, 1930, nine days before the vehicle was sold (R. 15).

The other indictment, to be hereafter called Indictment 28945, charged the petitioner and others with conspiring to transport another stolen motor vehicle in interstate commerce and with conspiring to receive, conceal, barter, and sell this vehicle (R. 26–31).

Petitioner was convicted upon all of the counts of these two indictments (R. 24, 34). Under Indictment 28944 he was sentenced to imprisonment for two years on the first count (the conspiracy count), and to imprisonment for four years on each of the two remaining counts. The judgment provided, however, that the sentence on the first count should be served concurrently with the sentences on the second and third counts,

and that the sentences on these counts should run consecutively. (R. 24.) The commitment issued in connection with these sentences provided that the sentences should date from November 30, 1931 (R. 35–36). On Indictment 28945 petitioner was sentenced to imprisonment for two years (R. 34), the commitment providing that the sentence should date from December 10, 1931 (R. 39). It is evident, therefore, that the aggregate sentence imposed upon the petitioner under the two indictments was eight years.

Petitioner did not appeal from these judgments but entered promptly upon the execution of his sentences (R. 37, 40).

On April 6, 1933, petitioner filed in the District Court of the United States for the Middle District of Pennsylvania a petition for writ of habeas corpus (R. 3–9), in which he alleged that he was then serving the sentences imposed upon him under the two indictments in the United States Penitentiary at Lewisburg, Pennsylvania. He sought in this petition to be relieved of the sentence of imprisonment imposed upon him under the third count of Indictment 28944, upon the grounds hereinafter stated. No attack was made upon the validity of the sentences imposed upon the other counts of the two indictments and petitioner admitted that he could be validly imprisoned for a term of four years (R. 7). He alleged that he had served one third of such valid four-year term; that he had vio-

lated none of the rules of the penitentiary; that his behavior had otherwise been good; and that he was therefore eligible to apply for a parole.

No attack was made in the petition for writ of habeas corpus upon the third count of Indictment 28944 upon the ground here urged, the petition alleging merely that the District Court for the Eastern District of New York was without power to impose the four-year sentence upon this count because the offense charged therein was committed outside of the territorial limits of that District, the sale of the vehicle having occurred in Jersey City, N.J. (R. 6–7).

In response to the petition for writ of habeas corpus an order was issued directing the warden of the penitentiary to show cause why the petition should not be granted (R. 10). After a hearing the District Court dismissed the petition and discharged the order to show cause (R. 1, 49). It held that under the National Motor Vehicle Theft Act venue may be laid in any district in or through which the stolen motor vehicle has been transported or removed, and that the Eastern District of New York was one of such districts. The court further held that the right of a defendant to be tried in the State and District wherein the crime was committed is one which a defendant may waive, and that such right was waived in the instant case by the petitioner even if it be conceded that he should have been tried in the District Court of the

United States for the District of New Jersey.[1] (R. 47–49.)

An appeal was taken by the petitioner from this decision to the Circuit Court of Appeals for the Third Circuit. The assignment of errors filed in connection with this appeal gave no indication of the question now urged. The assignments were couched in general language and were to the effect simply that the District Court erred in not directing the discharge of the petitioner "as prayed for in said petition" for writ of habeas corpus (R. 49).

The present contention that the indictment was defective because it did not charge the interstate movement of the stolen vehicle in the words of the statute was urged apparently for the first time in the Circuit Court of Appeals (R. 54–55). That court in its opinion passed over the question whether the proceeding could not be entertained because it was an attempt merely to use the writ of habeas corpus as a substitute for an appeal and decided the question presented upon the merits.

[1] The docket entries appearing in the instant record in connection with the two indictments (R. 24, 32–34, 41–47) do not disclose any plea or demurrer prior to trial based on venue. While a series of docket entries called in the record "Chronology of Proceedings in New York Court", show that there was made at the trial on behalf of petitioner a motion to dismiss the second and third counts of Indictment 28944, and also motions to set aside the verdict and in arrest of judgment, all of which were denied (R. 43–44), the grounds of these motions are not set forth in the record. No appeal was taken from either of the judgments in the two criminal proceedings.

After considering at length the purpose of the National Motor Vehicle Theft Act and the evil at which it was aimed, the court held (R. 58–59):

> Applying these observations to the averments of the third count of the indictment in this case as affecting interstate commerce, which are very similar, indeed almost identical, with those which were involved in *United States* v. *Drexel*, 56 F. (2d) 588, we are of opinion, in accord with the Circuit Court of Appeals for the Second Circuit, that the allegation, in the past tense, that the stolen motor vehicle had, before the sale, been transported in interstate commerce, was, if a defect, rather one of form than of substance under Section 556 of Title 18 U.S.C.A.,[2] and we are also of opinion, in accord with the thought in the *Drexel* case, that at any rate "within Section 391 of Title 28 of U.S.C.A. (28 U.S.C.A. Sec. 391)[3] if not strictly a formal it was certainly a 'technical defect' which did not 'affect the sub-

[2] This section (R.S. 1025) provides that "No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

[3] This section (Section 269, Judicial Code, as amended), provides that "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

stantial rights of the parties.' ". The pleader had been inept in expressing his meaning but that meaning was clear.

The third count of the indictment in this case shows that the characteristic of interstate commerce remained in the vehicle at the time of sale. The facts were, as we assume from the verdict and in default of an appeal, proved at the trial. It is, on the verdict, not disputed that the car was stolen in one district, transported to another district, there, without change of character, received by the relator, knowing it to have been stolen and transported, and by him sold, thus bringing the case on the averments of the count and on the proofs within the jurisdiction of the court that tried him.

The court accordingly affirmed the order of the District Court (R. 59–60).

ARGUMENT

While we believe that the decision of the Circuit Court of Appeals is correct (cf. *Hagner* v. *United States,* 285 U.S. 427), we submit that it is unnecessary for this Court to consider the question with which that decision dealt, a question as to which there is a conflict of decisions. The case of *United States* v. *Drexel,* 56 F. (2d) 588 (C.C.A. 8th) undoubtedly supports the position taken by the Circuit Court of Appeals in the instant case. But a contrary view was entertained in *Grimsley* v. *United States,* 50 F. (2d) 509 (C.C.A. 5th), and in *Davidson* v. *United States,* 61 F. (2d) 250, 255–

256 (C.C.A. 8th).[4] These cases, however, involved the sufficiency of a similar allegation to charge a present interstate movement of a stolen motor vehicle at the time it was received, concealed, stored, bartered, or sold where that question was presented upon an appeal prosecuted in the criminal case itself. Here the question is presented not upon an appeal in the criminal proceeding but in a proceeding for *habeas corpus*.

There can be no question that the pleader meant to charge in the allegation which is attacked that the petitioner and his co-defendants sold a stolen automobile, which they knew had been stolen, while the automobile was moving as a part of interstate commerce. That Congress has the power under the Constitution to provide for the punishment of such a crime has been decided by this Court (*Brooks* v. *United States*, 267 U.S. 432, 439), and that the District Court in which the indictment was returned had jurisdiction as a Federal court to try and to punish for such an offense as that attempted to be charged in the indictment cannot be disputed. It is evident, therefore, that the question now raised by the petitioner does not concern the jurisdiction of the trial court as a Federal court but relates merely to the sufficiency of the indictment to charge one of the essential elements of the offense attempted to be alleged. In other words,

[4] *Ventimiglia* v. *Aderhold*, 51 F. (2d) 308, a District Court decision cited by the petitioner (N.D. Ga.) did not involve the question here presented.

petitioner is attempting to accomplish by *habeas corpus* that which properly should have been the subject of an appeal in the criminal case. That *habeas corpus* may not thus be converted into a substitute for an appeal is settled beyond doubt by the decisions of this Court. Thus, in *Dimmick* v. *Tompkins*, 194 U.S. 540, 551–552, this Court said:

> It is also objected that the facts charged in either the first or fourth count of the indictment did not constitute any offense under the statute, and that the sentence was therefore without jurisdiction. * * * It is not, however, necessary in this case to decide the point, *for the indictment charged enough to show the general character of the crime, and that it was within the jurisdiction of the court to try and to punish for the offense sought to be set forth in the indictment.* If it erroneously held that the indictment was sufficient to charge the offense, the decision was within the jurisdiction of the court to make, and could not be reexamined on *habeas corpus*. The writ cannot be made to do the office of a writ of error. Even though there were, therefore, a lack of technical precision in the indictment in failing to charge with sufficient certainty and fullness some particular fact, the holding by the trial court that the indictment was sufficient would be simply an error of law, and not one which could be reexamined on *habeas corpus*. *Ex parte Parks*, 93 U.S. 18; *In re Coy*, 127 U.S. 731; *In re Eckart*, 166 U.S. 481. (Italics ours.)

And in *In re Eckart*, 166 U.S. 481, 483, it was said:

> The case is analogous in principle to that of a trial and conviction upon an indictment, the facts averred in which are asserted to be insufficient to constitute an offence against the statute claimed to have been violated. In this class of cases it has been held that a trial court *possessing general jurisdiction of the class of offences within which is embraced the crime sought to be set forth in the indictment* is possessed of authority to determine the sufficiency of an indictment, and that in adjudging it to be valid and sufficient acts within its jurisdiction, and a conviction and judgment thereunder cannot be questioned on *habeas corpus*, because of a lack of certainty or other defect in the statement in the indictment of the facts averred to constitute a crime. (Italics ours.)

See also *Ex parte Parks*, 93 U.S. 18, 23; *Ex parte Yarbrough*, 110 U.S. 651; *In re Coy*, 127 U.S. 731, 756; *Toy Toy* v. *Hopkins*, 212 U.S. 542, 548; *Matter of Gregory*, 219 U.S. 210, 213–214; *Glasgow* v. *Mayer*, 225 U.S. 420, 428–429; *Goto* v. *Lane*, 265 U.S. 393, 401–402; *Knewel* v. *Egan*, 268 U.S. 442, 446.

A similar question was recently presented to this Court in a petition for writ of certiorari to review the decision of the Circuit Court of Appeals for the Fifth Ciruit in *Aderhold, Warden* v. *Hugart*, 67 F. (2d) 247. In that case the prisoner Hugart

was convicted under an indictment which attempted to charge a violation of R.S. 3296, which makes it an offense for anyone to conceal distilled spirits which have been removed from a distillery to a place other than a bonded warehouse without the tax being paid. The indictment failed to allege that the tax had not been paid, obviously an essential element of the offense attempted to be charged. The Circuit Court of Appeals held that this defect in this indictment did not entitle the petitioner to his release on *habeas corpus*. The same reasoning was employed in the court's opinion as we present in this case. The case was brought to this Court by the prisoner on a petition for a writ of certiorari on the ground of a conflict of decisions. The decisions alleged to be in conflict were distinguished in the brief filed by the Government in opposition to the petition for writ of certiorari, and this Court on March 5, 1934, denied the application. (No. 735, Present Term.) The *Hugart* case and the instant case are, we submit, indistinguishable.

Furthermore, in *Goto* v. *Lane*, 265 U.S. 393, 401–402, this Court said:

> In the federal courts a discharge on *habeas corpus* of a prisoner held to answer a criminal accusation or confined under a judgment of conviction is granted only in the exercise of a sound judicial discretion. *Salinger* v. *Loisel, ante*, 224; *Storti* v. *Massachusetts*, 183 U.S. 138, 143. The remedy is

> an extraordinary one, out of the usual course, and involves a collateral attack on the process or judgment constituting the basis of the detention. The instances in which it is granted, when the law has provided another remedy in regular course, are exceptional and usually confined to situations where there is peculiar and pressing need for it or where the process or judgment under which the prisoner is held is wholly void.

In the instant case it is evident that, though ineptly expressed, the count in question sufficiently informed the petitioner of the offense with which he was charged to enable him to prepare his defense and to plead the judgment of conviction in bar of any further prosecution for the same offense. So far as the docket entries show (R. 24, 41), there was no request for a bill of particulars. In addition, neither the evidence nor the instructions of the trial judge in the criminal case are in the present record, and there is consequently no showing by the petitioner that either was insufficient to justify a finding by the jury, upon adequate evidence, that the sale of the stolen vehicle was the final step of a then existing interstate movement of the vehicle. Finally, it should be pointed out that the question now raised by the petitioner is obviously an afterthought. So far as the record discloses, it was not presented to the District Court which tried the petitioner; he did not make it the basis of

an appeal in the criminal case, for no appeal was taken in that case; relief was sought in the District Court in the instant case on an entirely different ground than that now urged, and the question now raised was presented to a court for the first time after the instant case had been appealed to the Circuit Court of Appeals. Under such circumstances, the language of this Court in *Grant Bros. Construction Co.* v. *United States,* 232 U.S. 647, 661, is peculiarly appropriate. In that case it appeared that the indictment failed to allege that certain acts of the defendant were knowingly done, although knowledge was an essential element of the offense defined by the statute, but this Court said:

> The defendant was in no wise prejudiced by the defect, and to make it a ground for reversing the judgment, notwithstanding the theory upon which the trial proceeded, would be most unreasonable. *San Juan Light Co.* v. *Requena,* 224 U.S. 89, 96; *Campbell* v. *United States, Id.* 99, 106.

There being no showing of any exceptional circumstances which would take the case out of the general rule, we submit that the courts below did not err in holding that the writ of *habeas corpus* should not issue.

CONCLUSION

The petitioner was in no wise prejudiced by the alleged defect in the count in the indictment which

he attacks, and his objection does not involve the jurisdiction of the trial court as a Federal court. We respectfully submit that the petition for a writ of certiorari should be denied.

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APRIL 1934.

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 15

CHARLES L. MCNALLY, PETITIONER

v.

HENRY C. HILL, WARDEN, UNITED STATES NORTHEASTERN PENITENTIARY, LEWISBURG, PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the District Court (R, 47–49) has not been reported. The opinion of the Circuit Court of Appeals (R. 53–59) is reported in 69 F. (2d) 38.

JURISDICTION

The judgment to be reviewed was entered February 13, 1934. (R. 60.) The petition for writ of certiorari was filed March 31, 1934, and granted May 7, 1934. (A. 62.) The jurisdiction of this Court to issue the writ rests upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the petitioner is entitled on *habeas corpus* to release from the sentence imposed upon him under the third count of one of the two indictments upon which he was convicted, because that count charged him with having, with knowledge of its theft, sold a stolen motor vehicle which "had theretofore been transported in interstate commerce", instead of charging him, in the language of Section 4 of the National Motor Vehicle Theft Act, with having sold a stolen motor vehicle "moving as, or which is a part of, or which constitutes interstate commerce."

STATUTES INVOLVED

These are set forth in the Appendix, *infra*, pp. 39–40.

STATEMENT

Two indictments, one containing three counts and another containing a single count, were returned against the petitioner in the District Court of the United States for the Eastern District of New York. The first count, of the indictment containing three counts, which will hereinafter, for the purpose of brevity, be called Indictment 28944, charged the petitioner and others with conspiring to transport a number of stolen automobiles in interstate commerce and with conspiring to receive, conceal, barter, and sell the automobiles

so transported. (R. 12–20.) The second count charged the defendants with the interstate transportation of a stolen motor vehicle. (R. 20–21.) The third count, which is the one here involved, charged that (R. 22–23):

> the defendants, on or about the 12th day of February, 1930, at Jersey City, in the State of New Jersey, did unlawfully, knowingly, and wilfully, sell a certain motor vehicle, to wit: a Lincoln Sedan, 1929 model, original motor number 59638, original serial number 59638, which said motor vehicle had theretofore been transported in interstate commerce, from the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York, to Jersey City, in the State of New Jersey, and which said motor vehicle had theretofore been stolen from the true owner thereof, on or about the 14th day of December, 1929, at the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York, the said defendants knowing that the said car so sold as aforesaid, had been stolen and transported in interstate commerce; against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided (Title 18, United States Code, Section 408).

It is charged in overt act one of the conspiracy count that the same vehicle was transported by the defendants from Brooklyn, N.Y., to Jersey

City, N.J., on February 3, 1930, nine days before the vehicle was sold. (R. 15.)[1]

The other indictment hereinafter called Indictment 28945, charged the petitioner and others with conspiring to transport another stolen motor vehicle in interstate commerce and with conspiring to receive, conceal, barter, and sell this vehicle. (R. 26–31.)

The petitioner was convicted upon all of the counts of these two indictments. (R. 24, 34, 44.) Under Indictment 28944 he was sentenced to imprisonment for two years on the first count (the conspiracy count), and to imprisonment for four years on each of the two remaining counts. The judgment provided, however, that the sentence on the first count should be served concurrently with the sentences on the second and third counts, and that the sentences on these counts should run consecutively. (R. 24, 45.) The commitment issued in connection with these sentences provided that the sentences should date from November 30, 1931.

[1] Neither the docket entries in connection with this indictment, appearing at R. 24, nor the "Chronology of Proceedings in New York Court", appearing at R. 41–47, which apparently relates only to Indictment 28944, indicate that there was filed any demurrer or motion to quash the indictment. While the "chronology" discloses that towards the close of the trial a motion to dismiss the third count was made on behalf of the petitioner (R. 43), that there were also made on his behalf a motion to set aside the verdict and a motion in arrest of judgment (R. 44), and that these motions were denied, the grounds of the motions are not set forth in the record.

(R. 35–36.) On Indictment 28945 petitioner was sentenced to imprisonment for two years (R. 34), the commitment providing that the sentence should date from December 10, 1931. (R. 39.) It is evident, therefore, that the sentence under Indictment 28945 was in effect a sentence to be served concurrently with those under Indictment 28944, and that the aggregate sentence imposed upon the petitioner under the two indictments was eight years.

The petitioner did not appeal from either of the two judgments but entered promptly upon the execution of his sentences. (R. 37, 40.)

On April 6, 1933, the petitioner filed in the District Court of the United States for the Middle District of Pennsylvania, a petition for a writ of *habeas corpus* (R. 3–9) in which he alleged that he was then serving the sentences imposed upon him under the two indictments in the United States Penitentiary at Lewisburg, Pennsylvania. He sought in this petition to be relieved of the sentence of imprisonment imposed upon him under the third count of Indictment 28944, upon the ground hereinafter stated. No attack was made upon the validity of the sentences imposed upon the other counts of the two indictments and petitioner admitted that he could be validly imprisoned thereunder for a term of four years. (R. 7.) He alleged that he had served one-third of such valid four-year term; that under the Parole Act a prisoner who has served one-third of his sentence is entitled, upon applica-

tion, to his release upon parole if his behavior has been good. (Act of June 25, 1910, c. 387, Sec. 1, 36 Stat. 819, as amended by the Act of January 23, 1913, c. 9, 37 Stat. 650; U.S.C., Title 18, Sec. 714); that his behavior had been good and that he had violated none of the rules of the penitentiary; and that he was being deprived of his right to apply for parole by reason of the invalid sentence imposed upon him under the third count of Indictment 28944.

No attack was made in the petition for writ of of *habeas corpus* upon the third count of Indictment 28944 upon the ground here urged, the petition alleging merely that the District Court of the United States for the Eastern District of New York was without power to impose the four-year sentence upon this count because the offense charged therein was committed outside of the territorial limits of that District, the sale of the vehicle having occurred in Jersey City, N.J., which was within the territorial jurisdiction of the District Court of the United States for the District of New Jersey. (R. 6–7.)

In response to the petition for writ of *habeas corpus* a rule was granted directing the warden of the penitentiary to show cause why a writ of *habeas corpus* should not be issued as prayed in the petition. (R. 10.) After a hearing the District Court dismissed the petition and discharged the rule to show cause. (R. 1, 47–49.) It held that under the

National Motor Vehicle Theft Act venue may be laid in any district in or through which the stolen motor vehicle has been transported or removed, and that the Eastern District of New York was one of such districts. The court further held that the right of a defendant to be tried in the State and District wherein the crime was committed is one which a defendant may waive, and that such right was waived in the instant case by the petitioner, even if it be conceded that he should have been tried in the District Court of the United States for the District of New Jersey, because the petitioner had not raised the question in the criminal proceeding but had first presented it on *habeas corpus*.

As the opinion does not discuss the present contention of the petitioner that the third count of Indictment 28944 was defective because it did not charge in the language of the statute that the vehicle was in interstate commerce at the time of sale, that question was apparently not presented in any form to the District Court.

An appeal was taken by the petitioner from the decision of the District Court to the Circuit Court of Appeals for the Third Circuit. The assignment of errors filed in connection with this appeal gave no indication of the question now urged. The assignments were couched in general language and were to the effect simply that the District Court erred in not directing that the petitioner be dis-

charged from serving the alleged invalid sentence upon the third count of Indictment 28944. (R. 49.)

Although it was raised apparently for the first time in that court, the Circuit Court of Appeals considered and disposed of the contention which petitioner now urges. (R. 54–55.) After stating (R. 55) that it would not commit itself "on the question whether or not this proceeding for a writ of *habeas corpus* is an attempted substitute for an appeal from the judgment of sentence," the court reached the conclusion, based upon its consideration of the purpose of the National Motor Vehicle Theft Act and the evil at which it was aimed, that "The Congress intended [to punish] a sale of a stolen motor vehicle which, having been unlawfully moved in interstate commerce and coming to rest, continues so closely related to that commerce as to remain 'as a part of' it." (R. 58.) The court then held (R. 58–59):

> Applying these observations to the averments of the third count of the indictment in this case as affecting interstate commerce, which are very similar, indeed almost identical, with those which were involved in *United States* v. *Drexel,* 56 F. (2d) 588, we are of opinion, in accord with the Circuit Court of Appeals for the Second Circuit, that the allegation, in the past tense, that the stolen motor vehicle had, before the sale, been transported in interstate commerce, was, if a defect, rather one of form than

of substance under Section 556 of Title 18 U.S.C.A., and we are also of opinion, in accord with the thought in the *Drexel* case, that at any rate "within Section 391 of Title 28 of U.S.C.A. (28 U.S.C.A. Sec. 391) if not strictly a formal it was certainly a 'technical defect' which did not 'affect the substantial rights of the parties.' The pleader had been inept in expressing his meaning but that meaning was clear."

The third count of the indictment in this case shows that the characteristic of interstate commerce remained in the vehicle at the time of sale. The facts were, we assume from the verdict and in default of an appeal, proved at the trial. It is, on the verdict, not disputed that the car was stolen in one district, transported to another district, there, without change of character, received by the relator, knowing it to have been stolen and transported, and by him sold, thus bringing the case on the averments of the count and on the proofs within the jurisdiction of the court that tried him.

It is not clear from the opinion of the Circuit Court of Appeals whether the question of venue was urged in that court. While there was some discussion of venue in the court's opinion, the reference thereto was, it would seem, merely incidental to the court's discussion of the question now presented. (See R. 58.) The question of venue is not discussed at all in the petition for writ of

certiorari and we consequently do not deem it necessary to consider it in this brief. Cf. *Johnson* v. *Manhattan Ry. Co.*, 289 U.S. 479, 494.

SUMMARY OF ARGUMENT

I

The count of the indictment which is in controversy sufficiently discloses an offense within Federal cognizance to render it immune from successful attack by a petition for a writ of *habeas corpus*. This writ calls in question only the jurisdiction of the court whose judgment is challenged. Consequently, the only question to be determined is the sufficiency of the indictment to show such jurisdiction. This is a much narrower question than is involved in a direct attack upon the indictment by demurrer or on appeal, in which case the indictment must be sufficient to inform the defendant of the nature of the offense and to advise him adequately of the charge which he must meet. The writ of *habeas corpus* cannot be used as a substitute for appeal, even though the petitioner may have failed to avail himself of his right to appeal. If the count in question apprised the trial court that it dealt with an offense which that court had jurisdiction to try, it was sufficient. This it clearly did. In fact it is fairly arguable that the indictment was sufficient even as against a direct attack.

II

The application for a writ of *habeas corpus* is premature, even assuming that the count in the indictment previously referred to was fatally defective. Petitioner was convicted also on another count, the validity of which he concedes and was sentenced to serve a term of four years thereupon, which term has not yet been completely served, even allowing to petitioner credit for all possible "good time" deductions. Consequently, the petitioner is in custody in execution of a valid sentence under a valid indictment. The fact that his privilege of applying for release on parole is interfered with by the existence of the second sentence does not make a writ of *habeas corpus* available to him.

ARGUMENT

I

THE COUNT IN CONTROVERSY SUFFICIENTLY DISCLOSES AN OFFENSE WITHIN FEDERAL COGNIZANCE TO RENDER IT IMMUNE FROM SUCCESSFUL ATTACK ON HABEAS CORPUS

The question here urged was apparently not raised in the trial court and consequently need not have been considered in the Circuit Court of Appeals (*Roberts* v. *Riley*, 116 U.S. 80; *McCarthy* v. *Arndstein*, 262 U.S. 355; *Ex parte Keizo Kamiyama*, 44 F. (2d) 503, 505 (C.C.A. 9th), and cases

cited). However, the question was considered and disposed of by that court, and we, therefore, assume that it is open for consideration here. *Friend* v. *Talcott*, 228 U.S. 27, 36.

In pursuing this inquiry it should be noted at once that, as was said in *Knewel* v. *Egan*, 268 U.S. 442, 445—

> It is the settled rule of this Court that *habeas corpus* calls in question only the jurisdiction of the court whose judgment is challenged. *Andrews* v. *Swartz*, 156 U.S. 272; *Bergemann* v. *Backer*, 157 U.S. 655; *In re Lennon*, 166 U.S. 548; *Felts* v. *Murphy*, 201 U.S. 123; *Valentina* v. *Mercer*, 201 U.S. 131; *Frank* v. *Mangum*, 237 U.S. 309.

An attack upon an indictment, by a petition for a writ of *habeas corpus* is, therefore, a very different matter than an attack by demurrer, or upon appeal. The first raises the very limited question whether the indictment is sufficient to show jurisdiction in the court, the second the much larger question whether the indictment was sufficient to inform the defendant of the nature of the offense and to advise him adequately of the charge which he must meet. It is well established by the decisions of this Court that *habeas corpus* may not be used as a mere substitute for a writ of error or an appeal. As was said in *Dimmick* v. *Tompkins*, 194 U.S. 540, 551–552:

> It is also objected that the facts charged in either the first or fourth count of the in-

> dictment did not constitute any offense under the statute, and that the sentence was therefore without jurisdiction. * * * It is not, however, necessary in this case to decide the point, *for the indictment charged enough to show the general character of the crime, and that it was within the jurisdiction of the court to try and to punish for the offense sought to be set forth in the indictment.* If it erroneously held that the indictment was sufficient to charge the offense, the decision was within the jurisdiction of the court to make, and could not be reexamined on *habeas corpus.* The writ cannot be made to do the office of a writ of error. Even though there were, therefore, a lack of technical precision in the indictment in failing to charge with sufficient certainty and fullness some particular fact, the holding by the trial court that the indictment was sufficient would be simply an error of law, and not one which could be reexamined on *habeas corpus. Ex parte Parks,* 93 U.S. 18; *In re Coy,* 127 U.S. 731; *In re Eckart,* 166 U.S. 481. (Italics ours.)

And in the case of *Knewel* v. *Egan, supra,* this Court made the further statement (p. 446):

> It is fundamental that a court upon which is conferred jurisdiction to try an offense has jurisdiction to determine whether or not that offense is charged or proved. Otherwise every judgment of conviction would be subject to collateral attack and review on *habeas corpus* on the ground that no offense

was charged or proved. It has been uniformly held by this Court that the sufficiency of an indictment cannot be reviewed in *habeas corpus* proceedings. *Ex parte Watkins*, 3 Peters 193; *Ex parte Yarbrough*, 110 U.S. 651; *Ex parte Parks, supra; In re Coy, supra; Bergemann* v. *Backer, supra; Howard* v. *Fleming*, 191 U.S. 126; *Dimmick* v. *Tompkins*, 194 U.S. 540; *In re Eckart*, 166 U.S. 481; *Goto* v. *Lane*, 265 U.S. 393.

That the petitioner may have failed to avail himself, as in the instant case, of his right to appeal does not change the rule. *Goto* v. *Lane*, 265 U.S. 393, 402; *Ex parte Spencer*, 228 U.S. 652, 659, 661; *Glasgow* v. *Moyer*, 225 U.S. 420, 430; *Kaizo* v. *Henry*, 211 U.S. 146, 148; *In re Lincoln*, 202 U.S. 178, 182; *Riggins* v. *United States*, 199 U.S. 547, 551.

It is evident, therefore, that the scope of the inquiry in this case is not whether in the count in controversy the element of interstate commerce was alleged with the particularity and precision which would enable it to withstand a successful attack by motion or demurrer or on an appeal in the criminal proceeding but whether the allegation was sufficient to disclose to the court, in which the petitioner was tried and convicted, that the pleader was charging an offense within Federal cognizance and not one wholly colorless or impossible (*Manning* v. *Biddle*, 14 F. (2d) 518, 519 (C.C.A. 8th)) or one patently within the jurisdiction of a State

court. (*White* v. *Levine*, 40 F. (2d) 502 (C.C.A. 10th).)[2]

If the count in controversy can fairly be considered as having apprised the trial court that it dealt with an offense of which that court as a Federal court had jurisdiction to try, no matter how ineptly it may have done so, it accomplished all that is required on *habeas corpus*. In other words, as was said in *Franklin* v. *Biddle*, 5 F. (2d) 19, 20 (C.C.A. 8th):

> The question in this case * * * is not the sufficiency of the indictment * * * against a direct attack by demurrer or motion in the trial court; it is its sufficiency to invoke the exercise of the jurisdiction of the court * * * which tried [the defendant] * * * to decide, if it had been requested by the defendant in the proper time so to do, whether or not that indictment was sufficient to require him to stand trial thereunder. And the test of jurisdiction is not right decision but the right to enter upon the inquiry and make some de-

[2] In *Manning* v. *Biddle* the petitioner was convicted as an aider or an abettor of an alleged offense which was not condemned by any Federal statute. In *White* v. *Levine* the indictment charged the petitioner with forging the name of the payee on a Government check "with intent to defraud the American Trust Co., St. Louis, Missouri," instead of charging that the forgery was done with the intention of defrauding the United States, as required by Section 29 of the Criminal Code. It is evident that if this indictment stated any offense it charged one of State and not Federal cognizance.

cision. *Foltz* v. *St. Louis & S. F. Ry. Co.*, 60 F. 316, 318, 8 C.C.A. 635; *King* v. *McAndrews*, 111 F. 860, 864, 50 C.C.A. 29.

Did the count in controversy meet this test? We submit that it is sufficiently evident therefrom that the pleader was attempting to charge an offense against Section 4 of the National Motor Vehicle Theft Act to warrant the exercise of jurisdiction by the trial court. Section 4 provides that "whoever shall * * * sell * * * any motor vehicle, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be punished," etc. Now, the count in question specifically charged that the vehicle had been stolen from its true owner in Brooklyn, New York, on December 14, 1929, that it had been transported from Brooklyn to Jersey City, New Jersey; that the petitioner and his co-defendants knew that the automobile had been stolen and that they knew that it had been transported in interstate commerce; and that with this knowledge they sold it on February 12, 1930.

The statute provides that it applies to a vehicle "moving as, or which is a part of, or which constitutes interstate * * * commerce." The count in controversy alleges that the vehicle in question "had theretofore been transported in interstate commerce" from Brooklyn to Jersey City. Can there be any doubt that this was sufficient to apprise a Federal court of the fact that the pleader was attempting to charge an offense under the

National Motor Vehicle Theft Act and to permit it to determine, if it had been requested to do so, whether or not the offense was properly charged? *Dimmick* v. *Tompkins, supra; Knewel* v. *Egan, supra.* As a matter of fact it is fairly arguable that the indictment is sufficient on its face to withstand direct attack. The allegation is that the vehicle in question "had theretofore been transported in interstate commerce." Does this not sufficiently set forth that characteristic of interstate commerce whch is referred to in those words of the statute, "* * * or which is a part of, or which constitutes interstate * * * commerce?" Certainly it cannot be contended that this allegation is equivalent to an averment that interstate commerce in the vehicle had ceased.[1] It states that

[1] With reference to a quite similar situation this Court said in *United States* v. *Pridgeon*, 153 U.S. 48, 59: "If the indictment does not fairly and sufficiently aver that the offence in question was committed in the Cherokee Outlet, *it certainly does not show affirmatively upon its face that it was committed elsewhere, and without the jurisdiction of the court.* It may be that upon demurrer or writ of error, the indictment might have been found defective in not alleging with greater certainty the particular locality in which the offence was committed, within the rule laid down in *McBride* v. *The State*, 10 Humph. Tenn.) 615, but it cannot be properly held that the indictment is so fatally defective on its face as to be open to collateral attack after trial and conviction, or that the sentence of the court pronounced thereon was void. The *habeas corpus* proceeding being a collateral attack of a civil nature, *it must clearly and affirmatively appear that the indictment charged an offense of which the court had no jurisdiction, so that its sentence was void.* This does not appear in the present case. (Italics ours.)"

prior to sale the vehicle had been physically brought from Brooklyn to Jersey City. This, of course, constituted interstate commerce. The statute and the decisions leave it beyond doubt that interstate commerce does not end at the very moment that the stolen vehicle is brought across a State line. As was said by this Court in *Brooks* v. *United States,* 267 U.S. 427, 439, with reference to Section 4 of the Act:

> The fourth section merely makes more effective the regulation contained in the third section. The third section punishes the transportation of a stolen automobile with knowledge of the theft. The fourth section punishes the receipt, the concealment, the storing, the bartering, the sale, or the disposition of such stolen vehicle, moving as interstate commerce, or as a part thereof, with knowledge of its having been stolen. Of course, this section can and does apply only to the storing or concealment of a stolen automobile with knowledge of its theft, *as a final step in the use of interstate transportation to promote the scheme of its unlawful disposition and the withholding of it from its owner.* (Italics ours.)

It is evident, therefore, that the characteristic of interstate commerce did not depart from the vehicle until some "final step" had been taken by those cooperating in the unlawful scheme of withholding the machine from its rightful owner. The "final step" is ordinarily, of course, the sale of

the vehicle, and interstate commerce in the vehicle certainly cannot end until, at least, the vehicle reaches the hands of someone not a party to the scheme. As was said in *Wilkerson* v. *United States*, 41 F. (2d) 654, 655 (C.C.A. 7th), certiorari denied, 282 U.S. 294, of a conspiracy to transport automobiles in interstate commerce and to receive, conceal, store, barter, sell, and dispose of them, "the conspiracy operated until the automobiles were final disposed of and lodged in the possession of some person who was not, at any stage, a party to the conspiracy." See also *Loftus* v. *United States*, 46 F. (2d) 841, 846–847 (C.C.A. 7th).

Applying these observations to the count in question, the District Court had before it, in determining whether it had jurisdiction to proceed, a count which charged that an automobile had been stolen in Brooklyn on a certain day; that it had been put in the channels of interstate commerce by transporting it from Brooklyn across the State line to Jersey City; that less than two months after its theft, the defendants, with full knowledge of the theft and with full knowledge that it had been transported in interstate commerce, sold this automobile in the State to which it was transported, thereby accomplishing what was evidently intended to be the "final step" of the unlawful scheme. Moreover, possession of a stolen vehicle in a State other than that of its rightful owner within a short time after its theft has been held to raise a re-

buttable presumption or inference that the possessor was the thief and had transported the vehicle in interstate commerce. *Drew* v. *United States*, 27 F. (2d) 715 (C.C.A. 2d), and cases cited.[4] The count in question alleged sale (and, of course, inferentially the possession) by the defendants within less than two months after its theft of a vehicle stolen in one State and transported into another. Obviously this was not an unreasonable length of time within which to accomplish the successful disposition of a stolen motor vehicle within the vicinity of its theft. It is true that at the trial the defendants might be able to rebut any inference arising from possession, but this certainly did not preclude the court, in passing upon the initial question of jurisdiction if it had been asked to do so, from taking into consideration any inferences which might properly be deemed to flow from the averments of the count. It should also be pointed out that in the conspiracy count of the same indictment the court was specifically informed by the allegations of overt act one that the

[4] *Wolf* v. *United States*, 36 F. (2d) 450 (C.C.A. 7th), does not appear to be *contra*. There it was held that if the inference arising from possession extended not only to the fact of theft by the possessor but also to the fact that he had transported the vehicle in interstate commerce, the inference was rebutted by the evidence in the case. Moreover, in the later case of *Wilkerson* v. *United States*, 41 F. (2d) 654, 657 (C.C.A. 7th), the same court appears to have accepted the authority of the *Drew* decision without question.

vehicle was transported by the defendants from Brooklyn to Jersey City on February 3, 1930, only nine days before it was sold by the defendants. (R. 15.)

The position of the Circuit Court of Appeals in this case was that the count in question sufficiently disclosed that the stolen vehicle was in interstate commerce when sold to render it immune from attack even if the question had been raised on an appeal in the criminal proceeding, and that *a fortiori* it would withstand attack in a proceeding for *habeas corpus*. The court said (R. 58–59) that it was of the opinion, in accord with the ruling of the Circuit Court of Appeals for the Second Circuit in *United States* v. *Drexel*, 56 F. (2d) 588, involving an averment with reference to interstate commerce similar to that contained in the count in controversy—

> that the allegation, in the past tense, that the stolen motor vehicle had, before the sale, been transported in interstate commerce, was, if a defect, rather one of form than of substance under Section 556 of Title 18 U.S.C.A. [R. S., Sec. 1025, *infra*, p. 40], and we are also of opinion, in accord with the thought in the Drexel case, that at any rate "within section 391 of Title 28 of U.S.C.A. [Section 269 of the Judicial Code as amended, *infra*, p. 40] if not strictly a formal it was certainly a 'technical defect' which did not 'affect the substantial rights of the parties.' The pleader had been inept in expressing his meaning but that meaning was clear."

In the *Drexel* case the indictment charged that the defendant received and concealed a certain motor vehicle which had been stolen at Philadelphia and "transported in interstate commerce." The court said that while "The more natural way to read the language undoubtedly is that the car 'had been transported,' rather than that it 'was being transported,' in interstate commerce," "the purpose of the allegation is entirely apparent; it was to charge the defendant with the offense of stealing a car [concealing a stolen car] which was part of interstate commerce, and practically he was adequately advised of what he must meet." It therefore ruled that the defect was merely a "formal" or "technical' defect. In *Grimsley* v. *United States,* 50 F. (2d) 509 (C.C.A. 5th), one judge dissenting, and in *Davidson* v. *United States,* 61 F. (2d) 250, 255 (C.C.A. 8th), allegations quite similar to those involved in the instant case and in the *Drexel* case were held to be fatally defective and not to present merely "formal" or "technical" defects.

In the *Drexel, Grimsley,* and *Davidson* cases the sufficiency of the allegations were, however, raised in appeals taken in the criminal proceedings themselves. Here the question is raised in a proceeding for *habeas corpus.* – While we believe that a convincing argument might have been made in support of the sufficiency of the indictment, even if the count in controversy had been attacked on an ap-

peal in the criminal proceeding (cf. *Hagner* v. *United States*, 285 U.S. 427), in view of the decisions of this Court and the considerations heretofore set out, it is unnecessary to do so in response to a petition for a writ of *habeas corpus*.

A somewhat similar question was recently presented to this Court in a petition for writ of certiorari to review the decision of the Circuit Court of Appeals for the Fifth Circuit in *Aderhold* v. *Hugart*, 67 F. (2d) 247, certiorari denied, 291 U.S. 676. In that case the petitioner had been convicted under an indictment which attempted to charge a violation of R.S. 3296, which makes it an offense for anyone to conceal distilled spirits which have been removed from a distillery to a place other than a bonded warehouse without the tax being paid. The indictment failed to allege that the tax had not been paid. Although there was no such offense known to the Federal law as that actually charged, the Circuit Court of Appeals held that the petitioner was not entitled to his release on habeas corpus, saying (pp. 247–248):

> on demurrer [the indictment] must have fallen for failure to allege a necessary element of the crime sought to be charged. The cases to this effect in *Woods* v. *United States* (C.C.A.) 26 F. (2d) 63, and *Dukes* v. *United States* (C.C.A.) 275 F. 142, relied on to support this judgment of discharge, were decisions on direct appeal from conviction. They have no application to collateral attack by writ of

> habeas corpus. In the latter, if there is such a class of crimes as the indictment apparently attempts to charge, and the court had jurisdiction over such crimes and over the person of the accused, the question of the sufficiency of the indictment to charge an offense cannot be raised or reviewed on habeas corpus. *Knewel* v. *Egan,* 268 U.S. 442, 446, 45 S.Ct. 522, 69 L.Ed. 1036. The trial court has power to determine, subject to orderly appeal, what the elements of the offense are and what the indictment should allege, and it ends inquiry about such things by deciding them. *Ex parte Watkins,* 3 Pet. 193, 7 L.Ed. 650; *In re Coy,* 127 U.S. 731, 8 S.Ct. 1263, 32 L.Ed. 274. Guilt or innocence, and the measure of punishment within the limits fixed by law, are the responsibility of the trial court and not of another judge on habeas corpus.

This Court on March 5, 1934, denied the petition for writ of certiorari (291 U.S. 676).

Moreover, in *Goto* v. *Lane,* 265 U.S. 393, 401–402, *supra,* this Court said:

> In the federal courts a discharge on *habeas corpus* of a prisoner held to answer a criminal accusation or confined under a judgment of conviction is granted only in the exercise of a sound judicial discretion. *Salinger* v. *Loisel, ante,* 224; *Storti* v. *Massachusetts,* 183 U.S. 138, 143. The remedy is an extraordinary one, out of the usual

> course, and involves a collateral attack on the process or judgment constituting the basis of the detention. The instances in which it is granted, when the law has provided another remedy in regular course, are exceptional and usually confined to situations where there is peculiar and pressing need for it or where the process or judgment under which the prisoner is held is wholly void.

In the instant case it is evident that, though perhaps ineptly expressed, the pleader was attempting in the count in question to charge the sale of a stolen motor vehicle in violation of Section 4 of the National Motor Vehicle Theft Act. Although it is immaterial to the present inquiry, it is interesting to note that there is nothing in the record to indicate even that the indictment was insufficient to inform the petitioner of the offense attempted to be charged, to enable him to prepare his defense, or to make it impossible for him successfully to plead the judgment of conviction in bar of any further prosecution for the same offense. So far as the docket entries show (R. 24, 41) there was no request for a bill of particulars. In addition, neither the evidence nor the instructions of the trial judge in the criminal case are in the present record, and there is consequently no showing by the petitioner that either was insufficient to justify a finding by the jury upon adequate

evidence that the sale of the stolen motor vehicle was the final step of a then existing interstate movement of the vehicle. In fact it is evident that the petitioner was in no way prejudiced by any defect in the indictment and that the question now raised is clearly an afterthought.

So far as the record discloses, it was not presented to the District Court which tried the petitioner; he did not make it the basis of an appeal in the criminal case, for no appeal was taken in that case; he did not file his application for *habeas corpus* until over a year after he had been committed to jail; release was sought in the District Court in this application on an entirely different ground from that now urged, and the question now raised was presented to a court for the first time after the instant case had been appealed to the Circuit Court of Appeals. Under such circumstances the language of this Court in *Grant Bros. Construction Company* v. *United States,* 232 U.S. 647, 661, seems peculiarly appropriate. In that case, an action for penalties for violation of the Alien Contract Labor Law, it appeared that the petition failed to allege that certain acts of the defendant were knowingly done, although knowledge was an essential element of the offense defined by the statute, but this Court, although it was considering the case on a writ of error to review the judgment for the penalties, said:

> The defendant was in no wise prejudiced by the defect, and to make it a ground for reversing the judgment, notwithstanding the theory upon which the trial proceeded, would be most unreasonable. *San Juan Light Co.* v. *Requena*, 224 U.S. 89, 96; *Campbell* v. *United States*, Id. 99, 106.

The only decision in a *habeas corpus* case cited by the petitioner is *Ventimiglia* v. *Aderhold*, 51 F. (2d) 308, a District Court decision (N.D.Ga.). This case dealt merely with the question of venue. In no place in his petition for writ of certiorari, so far as we can find, does the petitioner take the position that venue was not properly laid in the instant case if the indictment can be considered as having charged that the alleged vehicle was in interstate commerce at the time of sale. His position as we understand it, is that the trial court had no jurisdiction because, under his interpretation of the indictment, interstate commerce in the vehicle had ceased at the time of sale, and it is in this connection apparently that he cites the *Ventimiglia* case. (Brief in support of petition, p. 14.) The case has obviously no bearing upon the question here presented.

II

THE APPLICATION FOR WRIT OF HABEAS CORPUS IS PREMATURE

The petitioner was sentenced to serve four years on the second count of Indictment 28944, and four years on the third count of that indictment, the sentences to run consecutively.[1] (R. 24.) He admitted in his petition for writ of *habeas corpus* that the sentence on the second count is valid (R. 7), and he contests in this proceeding only the validity of the sentence on the third count. These sentences were imposed on November 30, 1931 (R. 24, 45), and the petitioner was delivered at the prison pursuant thereto on December 23, 1931. (R. 37.) Even if it be assumed that the sentence on the third count is invalid, as the petitioner contends, the Bureau of Prisons of this Department advises that if there be deducted from the sentence on the second count, the validity of which is not disputed, the full good conduct allowance of seven days a month permitted under the Act of June

[1] The sentence of two years on the first count of Indictment 28944 was directed to run concurrently with the sentences on the second and third counts. (R. 24.) Under Indictment 28945 a two-year sentence was imposed. (R. 34.) While this sentence was rendered several months prior to those under Indictment 28944 (R. 24), the warrants of commitment show that the sentences under Indictment 28944 were to date from November 30, 1931, and that the sentence under Indictment 28945 was to date from December 10, 1931 (R. 36, 39). It is evident, therefore, that the sentence under Indictment 28945 was in effect a sentence concurrent with those under Indictment 28944.

21, 1902, c. 1140, Section 1, 32 Stat. 397 (U.S.C., Title 18, Sec. 710), the sentence on that count would not expire until January 2, 1935.[6] It is evident, therefore, that the petitioner is now serving a concededly valid sentence which has not yet expired, and that even if this Court should determine that the sentence on the third count is invalid, it could not at this time discharge the petitioner from custody. The Court is, therefore, being called upon to determine a question which has not yet become anything more than academic.[7]

The object of the writ of *habeas corpus* is the liberation of those who may be imprisoned without just cause. *Ex parte Watkins*, 3 Pet. 191, 202. If the proceeding for the writ discloses that for any reason the petitioner must be remanded to custody, the writ will not lie. *In re Boardman*, 169 U.S. 39;

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[6] As the sentence upon the second count was rendered prior to July 29, 1932, the good conduct allowance is computed from the time the petitioner arrived at the penitentiary, December 23, 1931, and not from November 30, 1931, the date the warrant of commitment stated the sentence should commence to run. (R. 36.) Cf. Act of June 29, 1932, c. 310, Section 2, 47 Stat. 381 (U.S.C.Sup. VII, Title 18, Sec. 710 (a)).

[7] We are advised by the Bureau of Prisons that pursuant to a hearing held in August of this year, subsequent to the issuance of the writ of certiorari, the Parole Board granted the petitioner a parole effective December 15th next. Nevertheless, his sentence under the second count cannot expire, even with the good conduct allowance subtracted, until January 2, 1935. (See quotation from *Anderson* v. *Corall*, 263 U.S. 193, at p. 35, *infra*.) It means only that several weeks of the sentence would be served on parole.

Iasigi v. *Van de Carr*, 166 U.S. 391; *Stallings* v. *Splain*, 253 U.S. 339, 343. So long as one is confined under a valid sentence it cannot be said that he is being restrained without cause. Illegal restraint cannot begin until he commences the service of a sentence which is invalid. Only then is he in a position to secure relief on *habeas corpus*. As was said by this Court in *In re Swan*, 150 U.S. 637, 652, with respect to a situation similar to that here presented:

> It is further contended that the court exceeded its power in that the payment of costs was required, because the costs were in the nature of a fine, and therefore the punishment inflicted was both fine and imprisonment. * * * the sentence here was that the petitioner be imprisoned "until he returns to the custody of the receiver, the barrel taken by him from the warehouse without warrant of law. And when that has been surrendered, that he suffer a further imprisonment thereafter in said county jail for three months and until he pay the costs of these proceedings." As the prisoner has neither restored the goods nor suffered the imprisonment for three months, even if it was not within the power of the court to require payment of costs and its judgment to that extent exceeded its authority, yet he cannot be discharged on *habeas corpus* until he has performed so much of the judgment or served out so much of the sentence as it was within the power of the court to impose. *Ex parte Lange*, 18 Wall 163; *Ex parte Parks*, 93 U.S. 18.

And in *De Bara* v. *United States*, 99 Fed. 942, it was said by Circuit Judge (later Justice) Day, speaking on behalf of the Circuit Court of Appeals for the Sixth Circuit (pp. 947–948):

> Under a writ of habeas corpus the inquiry is, does the judgment exceed the authority of the court, and is the prisoner serving under a sentence beyond the power of the court to impose?
>
> It is true that the cases wherein the writ has been denied, because a part only of the sentence was within the power of the court to impose, have generally been those in which the judgment was of a clearly separable nature, as for costs and imprisonment, where there was power only to impose the one or the other. We see no reason why the rule should be limited to such cases, and think the true principle to be that, before a prisoner can be discharged upon habeas corpus, it must appear that he is serving by virtue of a judgment which the court had no power to impose. As long as he is serving an imprisonment within the limits of a term which the court might lawfully impose, acting within its power and jurisdiction, he cannot be discharged on habeas corpus, no matter how irregular or erroneous the judgment may be.
>
> In the present case the court had power to impose so much of the judgment as is now operative upon the prisoner, and therefore he cannot have relief by the writ of habeas

> corpus. We have already seen that it was within the power of the court, in any aspect of the case, to impose a sentence upon the prisoner of 18 months. This much of the sentence the prisoner has not yet served. We do not undertake to determine herein what may be the rights of the prisoner at the expiration of the term of 18 months, nor do we wish to be considered as in any wise foreshadowing the views which the court may hold as to his rights, should further application for the writ be made at that time. All that is now determined is that the petitioner, not having served the period for which he might legally be sentenced, cannot now have the benefit of the writ.

See also *Eori* v. *Aderhold*, 53 F. (2d) 840 (C.C.A. 5th); *Dodd* v. *Peak*, 47 F. (2d) 430, 431 (App.D.C.); *Carter* v. *Snook*, 28 F. (2d) 609, 610 (C.C.A. 5th); *Schultz* v. *Biddle*, 19 F. (2d) 478, 480 (C.C.A. 8th); *Cohen* v. *Biddle*, 12 F. (2d) 704, 705 (C.C.A. 8th); *Mabry* v. *Beaumont*, 290 Fed. 205 (C.C.A. 9th); *Price* v. *Zerbst*, 264 Fed. 669 (C.C.A. 5th); *Woodward* v. *Bridges*, 144 Fed. 156 (Mass.); *Ex parte Davis*, 112 Fed. 139 (C.C.Fla.).

We think it is, therefore, evident that the application for the writ in the instant case is premature. The petitioner, however, in effect, asks this Court to create an exception to the general rule heretofore stated because of the provisions of the Parole Law. Under that statute a prisoner whose record of conduct shows that he has observed the rules of the

institution in which he is confined, may be released on parole when he has served one-third of the total of the term or terms for which he was sentenced. (Act of June 25, 1910, c. 387, Sec. 1, 36 Stat. 819, as amended by the Act of January 23, 1913, c. 9, 37 Stat. 650 (U.S.C., Title 18, Sec. 714).) In his petition for writ of *habeas corpus*, the petitioner alleged that he had served one-third of the valid four-year sentence on the second count of Indictment 28944; that he was, therefore, entitled to make application to the Parole Board of the penitentiary for a parole and to have such application heard and decided by the Board; but that he was being deprived of this right because of the void sentence under the third count of the indictment, the Parole Board having no authority to consider an application for parole until the petitioner had served at least one-third of his total term of eight years, the aggregate of the two terms of four years on each of the two counts. (R. 8.)

Section 3 of the Parole Act provides that:

> If it shall appear to said board of parole from a report by the proper officers of such prison or upon application by a prisoner for release on parole, that there is a reasonable probability that such applicant will live and remain at liberty without violating the laws, and if in the opinion of the board such release is not incompatible with the welfare of society, then said board of parole may in its discretion authorize the release of such

> applicant on parole, and he shall be allowed to go on parole outside of said prison, and, in the discretion of the board, to return to his home, upon such terms and conditions, including personal reports from such paroled person, as said board of parole shall prescribe, and to remain, while on parole, in the legal custody and under the control of the warden of such prison from which paroled, and until the expiration of the term or terms specified in his sentence, less such good time allowance as is or may hereafter be provided for by law; and the said board shall, in every parole, fix the limits of the residence of the person paroled, which limits may thereafter be changed in the discretion of the board. * * * [Act of June 25, 1910, c. 387, Sec. 3, 36 Stat. 819; U.S.C. Title 18, Sec. 716.]

It will thus be seen that the granting of a parole rests within the discretion of the Parole Board. There is certainly no vested right to the parole. It may be denied if the Board feels that there is reason to believe that the applicant will not refrain from violating the law or if it is of the opinion that his release will be "incompatible with the welfare of society." It was, accordingly, held by the Circuit Court of Appeals for the Ninth Circuit in *Redman* v. *Duehay*, 246 Fed. 283, 284, that the decision of the Parole Board that a prisoner should not be released on parole could not be interfered with by the courts upon an application for a writ of *habeas corpus* filed by the prisoner. The court said (p. 285):

> Language expressive of legislative intent could not be plainer. It must appear to the board by showing in the manner prescribed that there is reasonable probability that the applicant for a parole will abide by the law; and if in the belief or judgment of the board his release is not incompatible with the welfare of society, the board may, in its discretion, authorize parole. The opinion called for is that of the board, and the power to authorize release is vested exclusively in the board to be exercised as it may, in its wisdom, see fit.
>
> Petitioner, having failed to show that he is entitled to relief from the courts, was properly denied the writ.

Not only is it obvious that the statute does not confer any vested right upon the prisoner to be released from confinement on parole after he has served one-third of his sentence, even upon a showing that he has not violated the rules of the prison, but the parole when granted does not shorten the term. As was said by this Court in *Anderson* v. *Corall*, 263 U.S. 193, 196, "The parole authorized by the statute does not suspend service or operate to shorten the term. While on parole the convict is bound to remain in the legal custody and under the control of the warden* until the expiration of the term, less allowance, if any, for good conduct.

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*Since the Act of May 14, 1930, c. 255, Sec. 2, 46 Stat. 272 (U.S.C.Sup. VII, Title 18, Sec. 723b), a paroled prisoner remains in the custody and control of the Parole Board created by that Act.

While this is an amelioration of punishment, it is in legal effect imprisonment." See also *Anderson* v. *Williams*, 279 Fed. 822, 826, 827 (C.C.A. 8th).

We think it is obvious, therefore, that where a prisoner is confined under a valid sentence, the only effect that an invalid consecutive sentence may have is to postpone or possibly defeat the opportunity which the prisoner would otherwise have of seeking under the Parole Law the privilege of an amelioration of his punishment under the valid sentence. It cannot, under any view, be considered as working a discharge from further restraint under the valid sentence. One case has been found which contains statements opposed to the thesis just stated. In *O'Brien* v. *M'Claughry*, 209 Fed. 816, 821, the Circuit Court of Appeals of the Eighth Circuit said:

> We cannot conceive that the second sentence against the petitioner, utterly void as it was and is, should be used to defer his right to apply for a parole (*United States* v. *Pridgeon*, 153 U.S. 48, 14 Sup. Ct. 746, 38 L.Ed. 631)* and, while fully convinced that the rule would be otherwise in the absence of the parole law, this case is reversed and remanded, with directions to the District Court to discharge the petitioner from the

* It is evident from the *Pridgeon* decision that it must have been cited in respect of the proposition that the judgment was void insofar as it imposed a sentence in excess of that which might be lawfully imposed. As the Parole Law was not passed until 17 years later, there is, of course, no reference to that law in the opinion.

> custody of the defendant as to the charge of larceny but to remand him upon the charge of breaking into a post office.

We think that this decision displays a mistaken conception of the effect of the Parole Law upon the status of a prisoner serving a valid sentence. It necessarily assumes that when a prisoner has served one-third of his sentence and has not breached any of the prison rules he has a vested right to a parole, and that if the parole is not granted further incarceration under the sentence becomes illegal. Such a viewpoint, however, completely ignores the theory and purpose of the statute. We submit, therefore, that the *O'Brien* decision is not well considered.[10] While the record does not disclose that the question under discussion was raised in either of the courts below, it is clear that on writ of certiorari the Government as respondent is entitled to urge any ground in support of the judgment of the Circuit Court of Appeals. *Langnes* v. *Green*, 282 U.S. 531, 538–539; *Story Parchment Co.* v. *Patterson Co.*, 282 U.S. 555, 560.

[10] While this decision was followed by the same court in *Cahill* v. *Biddle*, 13 F. (2d) 827, 828, the later decision of the court in *Hostetter* v. *United States*, 16 F. (2d) 921, 923, indicates that the court did not regard it as authoritative even upon the point here involved. (See "Point VI.") It must be admitted, however, that the decision in the *Hostetter* case is rather difficult to understand because of the brevity of the discussion.

CONCLUSION

For the reasons stated we respectfully submit that the judgment below should be affirmed.

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OCTOBER, 1934.

APPENDIX

STATUTES INVOLVED

The National Motor Vehicle Theft Act, c. 89, 41 Stat. 324, 325 (U.S.C., Title 18, Sec. 408), provides as follows:

> That this Act may be cited as the National Motor Vehicle Theft Act.
>
> SEC. 2. That when used in this Act:
>
> (a) The term "motor vehicle" shall include an automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle not designed for running on rails:
>
> (b) The term "interstate or foreign commerce" as used in this Act shall include transportation from one State, Territory, or the District of Columbia, to another State, Territory, or the District of Columbia, or to a foreign country, or from a foreign country to any State, Territory, or the District of Columbia.
>
> SEC. 3. That whoever shall transport or cause to be transported in interstate or foreign commerce a motor vehicle, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000, or by imprisonment of not more than five years, or both.
>
> SEC. 4. That whoever shall receive, conceal, store, barter, sell, or dispose of any motor vehicle, moving as, or which is a part of, or which constitutes interstate or for-

eign commerce, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000, or by imprisonment of not more than five years, or both.

SEC. 5. That any person violating this Act may be punished in any district in or through which such motor vehicle has been transported or removed by such offender.

Revised Statutes, Section 1025 (U.S.C., Title 18, Sec. 556), provide as follows:

> No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant. (R.S. § 1025.)

Section 269 of the Judicial Code, as amended by the Act of February 26, 1919, c. 48, 40 Stat. 1181, so far as pertinent, provides:

> * * * On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.

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SUPREME COURT OF THE UNITED STATES.

No. 15.—October Term, 1934.

Charles L. McNally, Petitioner, *vs.* Henry C. Hill, Warden United States Northeastern Penitentiary, Lewisburg, Pa.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[November 5, 1934.]

Mr. Justice Stone delivered the opinion of the Court.

Certiorari, 292 U. S. 619, brings this case here for review of a judgment of the Circuit Court of Appeals directing dismissal, on the merits, of a petition for a writ of *habeas corpus*. Petitioner was convicted and sentenced to be imprisoned upon two indictments framed under the Conspiracy Act of May 17, 1879, c. 8, 21 Stat. 4, as amended by Act of March 4, 1909, c. 321, § 37, 35 Stat. 1088, 1096, U. S. C., Title 18, § 88, and the National Motor Vehicle Theft Act of October 29, 1919, c. 89, 41 Stat. 324, 325, U. S. C., Title 18, § 408. The indictment which alone need be considered here was in three counts: the first charged petitioner and others with conspiracy to violate the provisions of the Motor Vehicle Theft Act; the second, the interstate transportation of a stolen motor vehicle; and the third, which is assailed here, the violation of § 4 of the Motor Vehicle Theft Act, by the sale in New Jersey of a motor vehicle which had been stolen in New York, "knowing that the vehicle had been so stolen and transported in interstate commerce." Petitioner was sentenced for a term of two years on the first count and for terms of four years each on the second and third counts, the sentence on the first to run concurrently with that on the second, the sentence on the second and third to run consecutively. Service of sentence was begun on November 30, 1931. It is conceded that the sentence on the second count, less allowances for good behavior, has not expired and that service of sentence on the third has not yet begun.

On April 6, 1933, the petitioner filed his petition for writ of *habeas corpus* in the district court for the middle district of Pennsylvania. He assailed the conviction and sentence on the third

count as void. No attack was made on the conviction and sentence on the other counts, but the petition advanced as reasons for granting the writ that under the Parole Act of June 25, 1910, c. 387; § 1, 36 Stat. 819, as amended by the Act of January 23, 191[illegible] 9, 37 Stat. 650; U. S. C., Tit. 18, § 714, petitioner was eligible to apply for parole, to be granted, in the discretion of the Parole Board, after serving one-third of his sentence; that he had served one-third or more of the valid sentence on the first and second counts, but less than one-third of the total period of imprisonment to which he had been sentenced on the three counts; and that consideration by the Parole Board of any application for his parole was precluded by reason of the outstanding, but void, sentence on the third count.

Numerous objections to the validity of the conviction and sentence under the third count were urged either in the district court or the Court of Appeals. The only one considered by the Court of Appeals was that the third count was void because it failed to charge the petitioner, in conformity to the words of § 4 of the statute, with having sold a stolen motor vehicle "moving as, or which is a part of, or which constitutes interstate or foreign commerce," but had charged him, instead, with knowingly selling a stolen motor vehicle which "had theretofore been transported in interstate commerce;" that it had thus failed to charge an offense against the United States since it appeared that the motor vehicle, at the time of the sale, had ceased to be the subject of interstate commerce.

The Court of Appeals did not consider whether the writ of *habeas corpus* could rightly be used to test the validity of the sentence on the third count, while the petitioner was in lawful custody under the sentence on the second, or whether the writ was improperly used as an attempted substitute for an appeal from the judgment of conviction. It contented itself with passing upon the sufficiency of the indictment and held that the act of sale charged was so closely related to the interstate transportation of the motor vehicle as to constitute the federal offense defined by the statute. It accordingly treated the alleged defects in the indictment as no more than formal and affirmed the order of the district court dismissing the petition. 69 F. (2d) 38.

We find it unnecessary to consider the questions raised or decided below, which the petitioner presses here. We conclude that,

as it appears from the petition that the detention of petitioner is lawful under the sentence on the second count, there is no occasion, in a *habeas corpus* proceeding, for inquiry into the validity of his conviction under the third.

The use of the writ of *habeas corpus* as an incident of the federal judicial power is implicitly recognized by Article I, § 9, Clause 2 of the Constitution, which provides: "The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." The justices of this Court and judges of the district courts were expressly given power to issue the writ by § 14 of the Judiciary Act of September 24, 1789, 1 Stat. 73, 81, 82, now embodied, with additions, in Chapter 14, Title 28, U. S. C. Under the statute in its present form the writ may issue "for the purpose of inquiry into the cause of restraint of liberty," but with the proviso that it "shall in no case extend to a prisoner in jail unless where he is in custody under or by color of the authority of the United States, ... or is in custody for an act done or omitted in pursuance of a law of the United States . . . . or is in custody in violation of the Constitution or of a law or treaty of the United States;" §§ 451, 452, 453, Tit. 28, U. S. C.

The statute does not define the term *habeas corpus*. To ascertain its meaning and the appropriate use of the writ in the federal courts, recourse must be had to the common law, from which the term was drawn, and to the decisions of this Court interpreting and applying the common law principles which define its use when authorized by the statute. *Ex parte Bollman & Swartwout*, 4 Cranch. 75, 93, 94; *Ex parte Kearney*, 7 Wheat. 38; *Ex parte Watkins*, 3 Pet. 193, 201, 202; *Ex parte Yerger*, 8 Wall. 85, 95; *Ex parte Parks*, 95 U. S. 18, 21, 22; *Ex parte Siebold*, 100 U. S. 371, 375; *Crowley* v. *Christensen*, 137 U. S. 86, 94; see *Whitney* v. *Dick*, 202 U. S. 132; *Craig* v. *Hecht*, 263 U. S. 255.

Originating as a writ by which the superior courts of the common law and the chancellor sought to extend their jurisdiction at the expense of inferior or rival courts, it ultimately took form and survived as the writ of *habeas corpus ad subjiciendum*, by which the legality of the detention of one in the custody of another could be tested judicially. See Holdsworth, History of the English Law, Vol. 9, 108-125. Its use was defined and regulated by the Habeas Corpus Act of 1679, 31 Car. II, c. 2. This legislation and the de-

cisions of the English courts interpreting it have been accepted by this Court as authoritative guides in defining the principles which control the use of the writ in the federal courts. See *Ex parte Watkins, supra*, 202; *Ex parte Yerger, supra*, 95; *Ex parte Parks, supra*, 21, 22.

The purpose of the proceeding defined by the statute was to inquire into the legality of the detention, and the only judicial relief authorized was the discharge of the prisoner or his admission to bail, and that only if his detention were found to be unlawful.[1] In this, the statute conformed to the traditional form of the writ, which put in issue only the disposition of the custody of the prisoner according to law.[2] There is no warrant in either the statute or the writ for its use to invoke judicial determination of questions which could not affect the lawfulness of the custody and detention, and no suggestion of such a use has been found in the commentaries on the English common law.[3] Diligent search of the

[1]The Habeas Corpus Act appears from its preamble to have been especially, although not exclusively, directed at cases in which the King's subjects were detained in custody upon a criminal charge where by law they were entitled to bail. It authorized the writ to issue, directed to any sheriff or gaoler, or other person "for any person in his or their custody." It commanded the production of the prisoner before the judicial officer to whom the writ was to be returned and directed that such officer "shall discharge" the "prisoner from his imprisonment" with provision for taking bail in his discretion, "unless it shall appear" to him that the petitioner "is detained upon a legal process, order or warrant out of some court that hath jurisdiction of criminal matters" or upon warrant for an offense "for which by law the prisoner is not bailable." 31 Car. II, § II (2), § III (6) (7).

[2]The writ, in its historic form, like that now in use in the federal courts, was directed to the disposition of the custody of the prisoner. It commanded the officer to "have the body" of him "detained in our prison under your custody," "together with the day and cause of his being taken and detained," before the judge at a specified time and place "to do and receive all and singular those things which our said chief justice shall then and there consider of him in this behalf." Richardson, The Attorney's Practice in the Court of Kings Bench, vol. 1, p. 369. Numerous writs, in substantially the same form, used between 5 Edw. IV and James II, are collected in Tremaine, Pleas of the Crown, 351-435. The earliest of these is reprinted in Coke's Second Institutes, 53. And see Hurd, Habeas Corpus, 232-233.

[3]Bacon, in his Abridgement, 425, declared the writ "is the most usual remedy by which a man is restored to his liberty if he hath by law been deprived of it." And Hale said that it was designed "to remove or avoid the imprisonment." Analysis of the Law, 78; see also Pleas of the Crown, 143. And see Coke, Second Institutes, 52, 53; Comyns, Digest of the Laws of England, 454; Blackstone, Commentaries, vol. 1, 129-137.

English authorities and the digests before 1789 has failed to disclose any case where the writ was sought or used, either before or after conviction, as a means of securing the judicial decision of any question which, even if determined in the prisoner's favor, could not have resulted in his immediate release.[4]

Such use of the writ in the federal courts is without the support of history or of any language in the statutes which would indicate a purpose to enlarge its traditional function. Section 14 of the Judiciary Act, by the language already quoted, was at pains to declare that the writ might issue for the purpose of inquiring into the cause of restraint of liberty. Without restraint of liberty, the writ will not issue. *Wales* v. *Whitney*, 114 U. S. 564; *Stallings* v. *Splain*, 253 U. S. 339, 343. Equally, without restraint which is unlawful, the writ may not be used. A sentence which the prisoner has not begun to serve cannot be the cause of restraint which the statute makes the subject of inquiry.

Considerations which have led this Court to hold that *habeas corpus* may not be used as a writ of error to correct an erroneous judgment of conviction of crime, but may be resorted to only where the judgment is void because the court was without jurisdiction to render it, *Ex Parte Watkins, supra*, 203; *Knewel* v. *Egan*, 268 U. S. 442, 445, 447, lead to the like conclusion where the prisoner is lawfully detained under a sentence which is invalid in part. *Habeas corpus* may not be used to modify or revise the judgment of conviction. *Harlan* v. *McGourin*, 218 U. S. 442; *United States* v. *Pridgeon*, 153 U. S. 48, 63. Even when void, its operation may be stayed by *habeas corpus* only through the exercise of the authority of the court to remove the prisoner from custody. That authority cannot be exercised where the custody is lawful.

Wherever the issue has been presented, this Court has consistently refused to review, upon *habeas corpus*, questions which do not concern the lawfulness of the detention.[5] *In re Graham*, 138

[4]The Court of Kings Bench, in Rex v. Clarkson, 1 Stra. 444, in refusing to order the release of a woman content to remain with her guardian, said: "We have nothing to do . . . but only to see that she is under no illegal restraint." See Brass Crosby's Case, 3 Wils. 189, 198. "This is a writ by which the subject has a right of remedy to be discharged out of custody, if he hath been committed and is detained contrary to law."

[5]In Morgan v. Devine, 237 U. S. 632, 637, the writ was denied on the merits and in Ex parte Spencer, 228 U. S. 652, petition for the writ was denied because sought to be used as a substitute for a writ of error, although in each

U. S. 468; *In re Swan*, 150 U. S. 637, 653; *Harlan* v. *McGourin, supra; United States* v. *Pridgeon, supra; Nishimura Ekiu* v. v. *United States*, 142 U. S. 651; *Iasigi* v. *Van der Carr*, 166 U. S. 391; *Hale* v. *Henkel*, 201 U. S. 43, 77; *Ex parte Wilson*, 114 U. S. 417, 421. The lower federal courts have generally denied petitions for the writ where the prisoner was at the time serving a part of his sentence not assailed as invalid.[6]

The petitioner asks here only a ruling which will establish his eligibility for parole, because of the invalidity of the sentence on the third count. The ruling sought is such as might be obtained in a proceeding brought to mandamus the Parole Board to entertain his petition for parole, if the sentence on the third count were void for want of jurisdiction of the court to pronounce it. This use of *habeas corpus* is unauthorized by the statutes of the United States, and for that reason the judgment ~~of the District Court~~ must be

Affirmed.

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case the petitioner had not served an admittedly valid part of his sentence. In neither case did the opinion discuss the question whether the application was premature.

[6] The Courts of Appeals in circuits other than the 8th have uniformly denied petitions for writs of *habeas corpus* when the prisoner was not at that time serving the part of the sentence said to be invalid. Carter v. Snook, 28 F. (2d) 609 (C. C. A. 5th); Eori v. Aderhold, 53 F. (2d) 840, 841 (C. C. A. 5th); De Bara v. United States, 99 Fed. 942 (C. C. A. 6th); United States v. Carpenter, 151 Fed. 214 (C. C. A. 9th); Mabry v. Beaumont, 290 Fed. 205, 206 (C. C. A. 9th); Dodd v. Peak, 47 F. (2d) 430, 431 (App. D. C.). And to the like effect, see Woodward v. Bridges, 144 Fed. 156 (D. C.); Ex parte Davis, 112 Fed. 139 (C. C.). This was the view of the Court of Appeals for the Eighth Circuit in Connella v. Haskell, 158 Fed. 285, 289. But in O'Brien v. McClaughry, 209 Fed. 816, 820, 821, that court, in order that the prisoner might apply for parole for the valid part of his sentence, remanded the prisoner with directions to the District Court to discharge the prisoner from custody with respect to the invalid sentence, but to remand him to custody upon the valid sentence. This procedure was followed by the same court in Cahill v. Biddle, 13 F. (2d) 827, 828, 829. But see Morgan v. Sylvester, 231 Fed. 886, 887; Hostetter v. United States, 16 F. (2d) 921, 923; and Schultz v. Biddle, 19 F. (2d) 478, 480, in the same court.

In Colson v. Aderhold, 5 F. Supp. 111, the district court for northern Georgia entertained a writ for *habeas corpus*, reduced the sentence from fifty to thirty-five years, and remanded him for custody to serve the valid part of his sentence.